NAVAL WAR COLLEGE

International Law Situations

WITH SOLUTIONS AND NOTES

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PREFACE

This annual volume, prepared by George Grafton Wilson, LL. D., professor of international law at Harvard University, covers the situations and discussions on this subject by the War College class of 1931. Professor Wilson's method has been to propound situations involving timely questions and after critical discussion to organize the material for publication. This procedure has led to the production of a series of studies of live questions on the maritime phases of international law, unique in design, but which should prove useful to officers and others whose profession takes them within the realm of international law. New fields are entered, especially in connection with aviation, where in many respects maritime precedents are followed.

In order to increase the usefulness of this publication, suggestions and criticism will be welcomed by the War College covering both topics and situations.

HARRIS LANING,
Rear Admiral, United States Navy,
President United States Naval War College.

JULY 16, 1931.

CONTENTS

Situation I

LONDON NAVAL TREATY, ARTICLE 22, AND SUBMARINES

It is granted that the London naval treaty[1] has been ratified by the signatories and that article 22 has been assented to by all other States. Subsequently there is war between states X and Y. Other states are neutral.

(a) The *Star*, a merchant vessel owned by a citizen of and flying the flag of state Y and having its decks stiffened for the mounting of 6-inch guns, receives a summons from submarine *No. 5* of state X to lie to, but the *Star* continues on its course. Submarine *No. 5* communicates with submarine *No. 6*, which is on the course the *Star* is taking, to sink the *Star*. Submarine *No. 6* without coming to the surface sinks the *Star*.

After the war claims are made against state X on the ground that the action of the submarines was illegal. What should be the decision, and why?

(*b*) Would the discovery by submarine of state X that on an enemy merchant vessel equipped in a manner similar to the *Star* 6-inch guns are mounted and pointed toward the submarine be sufficient to justify sinking of the merchant vessel even if they are not yet fired?

(*c*) May the submarine order a merchant vessel to accompany it under penalty of being sunk?

SOLUTION

(*a*) Under the conditions, the action of submarine *No. 5* in summoning the *Star* to lie to is legal and submarine *No. 5* may, in case of persistent refusal, use force as would

[1] See the London Naval Treaty of 1930, Appendix, p. 137.

a surface vessel. The action of submarine *No. 6* in sinking the *Star* is illegal because not in accord with article 22 of the London naval treaty.

(*b*) The submarine of state X would be justified in firing upon an enemy merchant vessel whose decks have been strengthened for mounting 6-inch guns when the guns are mounted and pointed at the submarine.

(*c*) A submarine may order a merchant vessel to accompany it to port under penalty of being sunk.

NOTES

London Naval Treaty, 1930.—The London naval treaty of 1930 specifically states its purpose to carry forward the work begun at the Washington Naval Conference of 1921–22. At the Washington conference a treaty relating to the use of submarines and noxious gases in warfare was drawn up but was never ratified by all the powers. Article 22 of the London naval treaty of 1930 was therefore the carrying forward of the regulation of the use of submarines.

In the discussion of the submarine at the London Naval Conference the representative of Great Britain, followed by the representatives of the British Commonwealth of Nations, favored the abolition of the submarine.

The following statements were made by Mr. Stimson of the American delegation:

> The American delegation at this conference is in favor of the abolition of the submarine. At the Washington conference in 1921–22 the American delegation accepted the view of their naval advisers that the United States needed a submarine force. They were therefore, at that time, opposed to its abolition. Such a stand was based upon purely naval strategy without reference to humanitarian considerations, because the conference agreed that the submarine should not be used aganist commerce except under the same obligations relative to the safety of passengers and crew, which applied to surface craft * * *.
>
> The essential objection to the submarine is that it is a weapon particularly susceptible to abuse; that it is susceptible of use

against merchant ships in a way which violates alike the old and well-established laws of war and the dictates of humanity. The use made of the submarine revolted the conscience of the world, and the threat of its unrestricted use against merchant ships was what finally determined the entry of my own country into the conflict. In the light of our experience it seems clear that in any future war those who employ the submarine will be under strong temptation, perhaps irresistible temptation, to use it in the way which is most effective for immediate purposes, regardless of future consequences. These considerations convince us that technical arguments should be set aside in order that the submarine may henceforth be abolished.

We have come to the conclusion that our problem is whether, in this day and age and after the experiences of the last war, the nations at this conference are justified in continuing to build these instruments of warfare, thereby assuming responsibility for the risk of repeating, in any possible future wars, the inhumane activities which have been condemned by the verdict of history. (Proceedings, London Naval Conference, 1930, p. 82 et seq.)

Mr. Leygues speaking for France said:

The submarine has often been mentioned as a machine without its like in naval warfare. That saying can hardly be maintained either as a matter of principle or as a matter of fact. Compared with the other ships, what are the distinctive features of the submarine? To the gun and torpedo, joined together, it adds submersion.

The latter discovery is never more surprising, nor in itself more unlawful, than was at the time of its first appearance the steamship as opposed to the sailing vessel.

To every improvement of offensive weapons corresponds a progress in defensive weapons. To the gun and the torpedo were opposed the armor, bulkheads, and the bulge. Against the surprise attacks of the submarine, navies already protect themselves by nets, mines, and the listening detectors.

The wireless has indeed multiplied the military efficiency of the submarine. But it must be some day or other outdone by a new appliance which will not only reduce its offensive or defensive powers to the level of older weapons but will show off its relative weakness.

Only the total abolition of war fleets might put a stop to the continual progress of technical evolution.

It has been maintained, on the other hand, that the submarine could only be used against merchant ships. The history of the recent war proves the contrary. * * *

We have yet to discuss the opinion that has been spread of the submarine being a barbarous instrument of war. It owes such a reputation to the use made of it in some quarters against merchant ships, in violation of the principles of humanity which are the foundation of international laws. But such violation is ascribable to those who have used the submarine to that effect, not to the submarine itself.

The use of the submarine against merchant ships is not necessarily unlawful. Everything depends on the intention behind it. There is no weapon which can not be used for criminal purposes. * * *

Since then, the evolution of the submarine has made it still more capable of carrying out extended operations while observing the rules established for surface ships. If submarines can fulfill the same duties, why should they not enjoy the same rights?

The logical conclusion is to treat alike, as far as both rights and duties are concerned, the submarine and the surface ship, and this is the conclusion to which the French Government has come.

The French Government is of opinion that an unrestricted submarine war against maritime trade should be outlawed. The right of visit, search, and seizure should be exercised by submarines under the rules, both present and future, to be observed by surface ships. (Ibid., pp. 85, 87.)

Admiral Takarabe, of the Japanese delegation, said:

The merits of a submarine are to be judged not by what it did but by what it is. It is not a ruthless weapon to be condemned in contradistinction to the surface craft. For that matter, what weapons of war can not be put to the merciless use of victimizing lives and property to no purpose? * * *

As to the necessity of putting an end, once and for all, to the recurrence of the appalling experiences of the World War, Japan heartily associates herself with the proposal which is apparently in the minds of all our colleagues to submit this category of arms to a strict circumscription by law. It was Japan's wish that the measure should early be adopted, and she not only signed the submarine treaty agreed upon at the Washington Conference but soon ratified it. She wishes most ardently that the present conference will revive that question and will succeed in finding a proper and effective formula, but more satisfactory in its conception than its invalid predecessor, so that all powers represented at this table should unite in making it operative in no distant future. Japan gives her full support to an undertaking to outlaw the illegitimate use of the legitimate and defensive agency of war. (Ibid., pp. 91, 92.)

A committee of jurists considered the proposition referred to committee No. 1 by the conference at its fourth plenary meeting in regard to "forbidding submarines to act towards merchant ships, otherwise than in strict conformity with the rules, either present or future, to be observed by surface warships."

This committee of jurists recommended a declaration to the following effect:

> The undersigned, duly authorized to that effect on behalf of their respective Governments, hereby make the following declaration:
>
> The following are accepted as established rules of international law:
>
> (*i*) In their action with regard to merchant ships, submarines must conform to the rules of international law to which surface war vessels are subject.
>
> (*ii*) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed the passengers, crew, and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land or the presence of another vessel which is in a position to take them on board. (Ibid. p. 189.)

In its report the committee said:

> The committee wish to place it on record that the expression "merchant vessel," where it is employed in the declaration, is not to be understood as including a merchant vessel which is at the moment participating in hostilities in such a manner as to cause her to lose her right to the immunities of a merchant vessel. (Ibid. p. 189.)

While this report was not adopted by the conference, it is usually regarded in absence of statement to the contrary that an article is to be interpreted in the sense in which it is interpreted by the drafting committee.

Loss of immunities.—The attempts to define such terms as "armed ship" have met with many difficulties. Attempts to define the term for purposes of national admin-

istration have not been satisfactory. National courts have been obligated to make interpretations of their own laws in case of capture of armed ships. Prize money, bounty to the personnel of a vessel of war making a capture, and similar awards were common till recent times and are still made.

In 1805 in the case of *Several Dutch Schurjts* the British court in declining to grant head money to the captors of "armed vessels taken from the enemy, and described as transports" said:

> They may be armed only for their own defense; as they have no commission to act offensively, they can not be considered legally as ships of war, to the effect of entitling the captors to head money. (6 Robinson Admiralty Reports, p. 48.)

A somewhat different attitude was taken by the judicial committee of the Privy Council in the case of H. M. submarine *E–14*, which destroyed the Turkish vessel *Guj Djemal* on May 10, 1915. The prize court had dismissed the claim of the personnel of the *E–14* for prize bounty on the ground that under the naval prize act of 1864 the expression "armed ships" should be construed to mean "a fighting unit of the fleet, a ship commissioned and armed for the purpose of offensive action in a naval engagement," and that the *Guj Djemal*, acting as a Turkish transport, was not such a ship. The case was dismissed without prejudice in case further evidence could be adduced.

> The facts proved at the first hearing were as follows: (*a*) The *Guj Djemal* before the war was a unit of the Turkish Navy, and appeared as such in the official lists of the Turkish Naval Forces; (*b*) the *Guj Djemal* was a fleet auxiliary manned by naval ratings and commanded by an officer of the Turkish Navy; (*c*) Turkish fleet auxiliaries were usually armed with about four light 6-pounder guns, but there was no definite evidence that the *Guj Djemal* was so armed; (*d*) the *Guj Djemal*, at the time of her destruction, was carrying troops, with their rifles and ammunition, to the number of approximately 6,000; (*e*) the *Guj Djemal* had on board six field guns, but there was no definite evidence as to where the guns were placed; (*f*) the *Guj Djemal* was escorted

by a torpedo boat destroyer, and either the *Guj Djemal* or her escort fired at *E–14;* and (*g*) rifle fire is effective against the periscope of a submarine and *E–14* had previously lost one periscope, and had the other become damaged she would have been unable to return through the Dardanelles to her base.

The further facts proved at the second hearing, in addition to the head bounty certificates produced, were that: (*a*) the *Guj Djemal* was in fact armed with six light quick-firing guns; (*b*) the field guns were placed on board the *Guj Djemal* in the after part of the ship, and on each side of the ship in such manner that they could be used as an addition to the armament of the ship, and ammunition for the guns was placed alongside the guns: and (*c*) field guns had in fact been used in similar circumstances to fire on His Majesty's submarines operating in the Sea of Marmora. (3 Grant, Br. and Col. Prize Cases, p. 568.)

In rendering the judgment of the judicial committee, Lord Sumner said as to the question whether the *Guj Djemal* is "an armed ship of any of His Majesty's enemies":

> This is entirely a matter of construction of the section in its application of the facts of this case, and no other question was raised in the appeal. Little assistance, if any, is to be derived from prior decisions or earlier legislation. No decision before the war turned on or touched this section, and in the cases decided during the war the present contention had not been raised. The older acts go back for many generations. At one time the number of guns, and not of men carried by the ship destroyed, was the measure of the grant, and until the Crimean War the expression "armed ship" was not used. (1920 A. C., p. 403.)

It was admitted that the combatant capacity of the *Guj Djemal* was not high and that she had not used her armament, that the armament was only incidental, and that such contentions had influenced the prize court in deciding that an armed ship, within the meaning of the section to be construed, is a fighting unit of the fleet, a ship commissioned and armed for the purpose of offensive action in a naval engagement. This construction was not sustained on appeal, and it was said:

> Evidently this proposition is open to several objections. It makes the rights of His Majesty's forces depend on the purpose with which his enemies may have dispatched their vessel on what

either way is a warlike service. It employs a term, "offensive action," which, in practice, is of indefinite meaning, and in any case involves an inquiry into the state of mind of the hostile commander. Sir Samuel Evans elucidated his meaning thus in another passage: "In my opinion, if it were proved that she carried a few light guns, that would not constitute her an armed ship any more than a merchant vessel armed for self-defense; nor would the fact that she carried troops armed with rifles and some field guns and other ammunition intended to be used after the landing of the troops."

Their lordships are unable to accept these propositions. Of the case of a merchant ship they say nothing, for this is a question on the meaning of the words "ship of the enemy," and the appellants did not contend, nor needed they to do so, that any ship but one in state service would be covered by those words. There is again no evidence that the rifles and field pieces were not intended to be used at sea under any circumstances, little as any occasion for their use was to be looked for, and it must be recollected that defense is not confined to taking to one's heels or even to returning a blow, but, in the jargon of strategy, may consist in an offensive-defensive, or in plain words in hitting first. No criteria would more embarrass the application of the enactment than these, and to introduce the test of a ship's commission is to introduce something which involves a rewriting of the section.

Their lordships are of opinion that the words of the section are plain, and that the facts fit them, and accordingly the appellants are entitled to succeed; that the decree appealed against should be set aside; and that this appeal should be allowed with costs, and that the case should be remitted to the prize court to make such formal decree in favour of the appellants as may be required. Their lordships will humbly advise His Majesty accordingly. (3 Grant, Br. & Col. Prize Cases, p. 568.)

This judgment shows the difficulty of establishing criteria for such words as "offense" and "defense." It may also be said that "the test of the ship's commission" is in general difficult, if possible, for an enemy to apply.

The status of armed merchant vessels has raised questions in regard to both policy and law. If the law is not clear, then the relations as belligerent on the offensive, on the defensive, and as a neutral must be considered and the policy determined accordingly.

During the World War there was much difference of opinion as to the law, particularly because of new exigencies of transportation. Early precedents concerned with the irregular maritime warfare of the period prior to and during the Napoleonic wars refer to private and public vessels only.

Publicly owned armed or unarmed merchant vessels make a practically new category upon which there is much difference of opinion. Such publicly owned vessels of a belligerent certainly have a doubtful status both as regards the belligerents and as regards the neutrals. Naturally there arise questions as to the reasons for and the liability in consequence of arming. Some maintain that the rights and duties of the vessels themselves would under modern conditions change. The source of the equipment and the personnel for its use has in recent years been entirely different from that of private vessels of the early years of the nineteenth century.

The volunteer fleet of Imperial Russia and similar fleets of other States raised questions in regard to piracy or the piratical nature of armed merchant vessels.

Subsidized merchant vessels and the state control of shipping introduced a mixed relationship to the state of the flag.

The position of the United States was not uniform throughout the war, and when the Dutch ships were taken over other complications were introduced; while the requisitioning of other vessels gave rise to further questions.

The problems of conversion and the place of conversion may properly be considered.

Armed merchant vessels in neutral waters may provoke such correspondence as that between the Netherlands and Great Britain.

The attitude of the Conference on Limitations of Armament in 1921–22 and in 1930 presumed the arming of merchant vessels.

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Many neutrality proclamations during the World War anticipated that merchant vessels might be armed.

Neutral merchant vessels received guns and took on naval gun crews, and the effect upon their status was debated.

The correspondence of the United States on armed merchant vessels began early in the World War and continued till the United States entered the war.

The effect of arming merchant vessels may modify the operation of the well-established rules of the Declaration of Paris in regard to goods on enemy vessels. It should be emphasized that acts of retaliation do not change the law.

Classes of armed vessels.—The classification of armed vessels in order that their treatment in time of war might be determined has long been a subject of discussion. At the Hague Conference of 1907 Lord Reay proposed a classification of vessels of war into (1) vaisseaux de combat, and (2) vaisseaux auxiliaires. After much discussion and a report by a committee the definition of vaisseaux auxiliaires was withdrawn. In 1912 British regulations stated:

> The term "ship of war" is to be understood as including all ships designated as such in the accepted sense of the term and also auxiliary vessels of all descriptions.

In a note of August 4, 1914, from the British chargé to the Secretary of State of the United States, the attention of the United States was called to the rules of the treaty of Washington of 1871 as having "the force of generally recognized rules of international law." It was also stated that Germany might attempt to equip and despatch merchantmen from ports of the United States for conversion on the high seas and that preparations for such purpose might be manifest before the vessel left port and that in these cases "His Majesty's Government will accordingly hold the United States Government responsible for any damages to British trade or shipping,

or injury to British interests generally, which may be caused by such vessels having been equipped at or departing from United States ports." (9 Am. Jour. Int. Law, Spec. Sup., July, 1915, p. 222.)

In another note of August 9, 1914, referring to the previous note, not merely the British point of view as to the responsibility but also as to the duty of neutrals was set forth as regards British armed merchant vessels:

> As you are no doubt aware, a certain number of British merchant vessels are armed, but this is a precautionary measure adopted solely for the purpose of defense, which, under existing rules of international law, is the right of all merchant vessels when attacked.
>
> According to the British rule, British merchant vessels can not be converted into men-of-war in any foreign port, for the reason that Great Britain does not admit the right of any power to do this on the high seas. The duty of a neutral to intern or order the immediate departure of belligerent vessels is limited to actual and potential men-of-war, and in the opinion of His Majesty's Government there can therefore be no right on the part of neutral governments to intern British armed merchant vessels which can not be converted into men-of-war on the high seas nor to require them to land their guns before proceeding to sea.
>
> On the other hand, the German Government have consistently claimed the right of conversion on the high seas, and His Majesty's Government therefore maintain their claim that vessels which are adapted for conversion and under German rules may be converted into men-of-war on the high seas should be interned in the absence of binding assurances, the responsibility for which must be assumed by the neutral government concerned, that they shall not be so converted. (Ibid. p. 223.)

The United States in a note of August 19, 1914, disclaimed as a correct statement of its responsibility the assertion of the British note. The British ambassador on August 25, 1914, gave the Secretary of State "the fullest assurances that British merchant vessels will never be used for purposes of attack; that they are merely peaceful traders armed only for defense; that they will never fire unless first fired upon; and that they will never under any circumstances attack any vessel." (Ibid. p. 230.) Later, on September 9, 1914, the atti-

tude which the British affirmed as correct under international law was stated.

A merchant vessel armed purely for self-defense is, therefore, entitled under international law to enjoy the status of a peaceful trading ship in neutral ports and His Majesty's Government do not ask for better treatment for British merchant ships in this respect than might be accorded to those of other powers. They consider that only those merchant ships which are intended for use as cruisers should be treated as ships of war and that the question whether a particular ship carrying an armament is intended for offensive or defensive action must be decided by the simple criterion whether she is engaged in ordinary commerce and embarking cargo and passengers in the ordinary way. If so, there is no rule in international law that would justify such vessel, even if armed, being treated otherwise than as a peaceful trader.

In urging this view upon the consideration of the United States Government the British ambassador is instructed to state that it is believed that German merchant vessels with offensive armament have escaped from American ports, especially from ports in South America, to prey upon British commerce in spite of all the precautions taken. German cruisers in the Atlantic continue by one means or another to obtain ample supplies of coal shipped to them from neutral ports; and if the United States Government take the view that British merchant vessels which are bona fide engaged in commerce and carry guns at the stern only are not permitted purely defensive armament, unavoidable injury may ensue to British interests and indirectly also to United States trade which will be deplorable. (Ibid. p. 233.)

This note seems to mix to some degree, legal and commercial reasoning.

On March 2, 1916, the British Government made public instructions issued in regard to armed merchant ships which were stated to be an affirmation of a policy which had remained unchanged throughout the war. In these instructions the circumstances under which armament should be employed were as follows:

(1) The armament is supplied for the purpose of defense only. The object of the master should be to avoid action whenever possible.

(2) Experience has shown that hostile submarines and aircraft have frequently attacked merchant vessels without warning. It is important, therefore, that craft of this description

should not be allowed to approach to short range, at which a torpedo or bomb launched without notice would almost certainly be effective. British and allied submarines and aircraft have orders not to approach merchant vessels; consequently, it may be presumed that any submarine or aircraft which deliberately approaches or pursues a merchant vessel does so with hostile intention. In such cases fire may be opened in self-defense in order to prevent the hostile craft from closing to a range at which resistance to a sudden attack with bomb or torpedo would be impossible.

(3) An armed merchant vessel proceeding to render assistance to the crew of a vessel in distress must not seek action with any hostile craft, though if she herself is attacked while doing so fire may be opened in self-defense.

(4) It should be remembered that the flag is no guide to nationality. German submarines and armed merchant vessels have frequently employed the British, allied, or neutral colors to approach undetected. Though, however, the use of disguise and false colors to escape capture is a legitimate ruse de guerre, its adoption by defensively armed merchant ships may easily lead to misconception. Such vessels, therefore, are forbidden to adopt any form of disguise which might cause them to be mistaken for neutral ships. (1917 N. W. C., International Law Documents, p. 154.)

In paragraph (2) there is provision for opening fire by the armed merchant vessel, and paragraph (4) shows some of the possible consequences anticipated from arming of merchant vessels. These depart from the assurances of August 25 that British armed merchant vessels " will never fire unless first fired upon, and that they will never under any circumstances attack any vessel."

In 1916 in a document ordered printed by the Senate of the United States a translation of a report citing the opinion of Prof. W. J. M. von Eysinga, then of the University of Leiden, later a judge of the Permanent Court of International Justice, it was said:

It is difficult to predict what is to be the development of the obscure legal category *ships*. In any case this development will be strongly influenced by the attitude of insurance companies toward armed merchantmen. Just now no other governments seem as yet to have followed the example of the British Admiralty. Still the number of armed ships sailing under the British flag keeps on increasing and the other governments will be con-

strained by the fact to inquire what shall be their attitude toward these ships both in time of peace and in time of war. If an English war were to arise, would not neutral powers transgress by admitting armed merchantmen to their ports and waters? What measures will neutral powers be obliged to take in order to prevent these armed ships from assuming the right to enforce restrictive measures on neutral commerce? Does public security allow of admitting armed ships to enter port, even in time of peace, without having unloaded their explosives? And are belligerents to take these armed ships as belligerent ships, or are they to have to treat them otherwise? If so, in what manner?

All these questions and many others would lose their practical significance if a way were found to abolish the institution of armed merchantmen. It will not be an easy matter. But possibly Great Britain might be induced to abandon the course upon which she has entered. It need not be said that the problem would no longer have a practical side if a way were found to "regularize" the armed ships by granting them the juridical status of what in reality they seem to be, viz, auxiliary men-of-war. The study of this solution should also include the question whether a government arming ships without assuming responsibility for their acts is satisfactorily performing the duties which members of the community of nations owe to their fellows. (S. Doc. No. 332, 64th Cong., 1st sess., p. 43.)

Attitude of Netherlands.—The Netherland declaration of neutrality, August 5, 1914, denied access to continental Dutch ports to "warships or ships assimilated thereto."

British opposition to this Dutch position was immediate in a telegram of Sir Edward Grey, August 8, 1914. (British Parliamentary Papers, Misc., No. 14 (1917) Cd. 8690.) In a letter of April 7, 1915, the Dutch Minister of Foreign Affairs said of his Government: "The observation of a strict neutrality obliges them to place in the category of vessels assimilated to belligerent warships those merchant vessels of the belligerent parties that are provided with an armament and that consequently would be capable of committing acts of war" (Ibid, p. 3), and on July 31, 1915, he again maintains the Government's purpose to exclude "any belligerent merchant vessel armed with the object of committing, in case of need, an act of war." (Ibid, p. 6.) The Government at the same

time admits that such armament may be lawful, so far as the belligerent is concerned.

In a letter of April 4, 1917, Mr. Loudon says:

> In fact, a state in the very special geographical position in which the Netherlands find themselves in relation to the belligerent nations could not insure respect for neutrality of the territory under its jurisdiction, except by forbidding access to this territory not only to warships but also to every armed vessel. (Ibid., p. 8.)

Lord Robert Cecil in May, 1917, made an extended argument to maintain that an "armed merchantship, such as those with which we are now dealing," can in no sense be assimilated to a warship, which phrase should cover only auxiliary vessels of various kinds and not armed merchant vessels. (Ibid., p. 11.) He also intimated that Great Britain "must hold the Netherlands Government responsible for all losses to British ships trading with Holland so long as those vessels are, if they enter a Netherland port, obliged to forego their right to provide themselves with means of self-defense." (Ibid., p. 13.) This responsibility the Dutch Government declined "without hesitation."

South American attitude toward armed merchant vessels.—After the publication of the memorandum of the Department of State of September 19, 1914,[1] some of the South and Central American states inclined to follow the same procedure in regard to the treatment of armed merchant vessels. Some of these states, however, found cause for complaint in the arming of merchant vessels, and domestic laws in some states prohibited the entrance of vessels with explosives on board, and some states had other regulations restricting the entrance and sojourn of such vessels. Complaint was made in South America in the early days of the World War that if armament was solely for defense it would generally be useless, that the responsibility for the use of armament should be upon the state whose flag the vessel flew; that irresponsible mer-

[1] Naval War College, International Law Topics, 1916, p. 93.

chantmen would not be familiar with or observe the laws of maritime warfare; that such vessels would be neither privateers nor merchantmen but privileged vessels free from the restrictions placed upon vessels by the existing laws of neutrality. Further, if the arms were used solely for defense, the use of these arms or the fact that they were on board for possible use would justify an enemy in attacking such vessels without meeting the usual obligations prior to attack, thus unnecessarily endangering innocent persons and property. Some of these states in early discussions and reports predicted that the arming of merchant vessels would be followed by abuses which would give rise to complications which might and should be avoided by enrolling all armed vessels in the regular or auxiliary forces.

British opinion, 1916.—On December 21, 1916, the First Lord of the Admiralty, replying to a question on armed merchant vessels, said:

> His Majesty's Government can not admit any distinction between the rights of unarmed merchant ships and those armed for defensive purposes. It is no doubt the aim of the German Government to confuse defensive and offensive action with the object of inducing neutrals to treat defensively armed vessels as if they were men-of-war. Our position is perfectly clear—that a merchant seaman enjoys the immemorial right of defending his vessel against attack or visit or search by the enemy by any means in his power, but that he must not seek out an enemy in order to attack him—that being a function reserved to commissioned men-of-war. So far as I am aware, all neutral powers, without exception, take the same view, which is clearly indicated in the Prize Regulations of the Germans themselves. I have confined myself to stating the general position, but my honorable friend may rest assured that the departments concerned are devoting continuous attention to all questions connected with the theory and practice of defensive armament. (88 Parliamentary Debates, Commons, 1916, 5th series, p. 1627.)

Case of the "Panama."—In the case of the *Panama*, a Spanish vessel carrying mail, 1898, the Supreme Court said:

It may be assumed that a primary object of her armament, and, in time of peace, its only object, was for purposes of defense. But that armament was not of itself inconsiderable, as appears not only from the undisputed facts of the case but from the action of the district court, upon the application of the commodore commanding at the port where the court was held, and on the recommendation of the prize commissioners, directing her arms and ammunition to be delivered to the commodore for the use of the Navy Department. And the contract of her owner with the Spanish Government, pursuant to which the armament had been put on board, expressly provided that in case of war that Government might take possession of the vessel with her equipment, increase her armament, and use her as a war vessel; and, in these and other provisions, evidently contemplated her use for hostile purposes in time of war. (176 U. S. [1900] 530.)

Article 14 and days of grace.—Article 14 of the Washington Treaty Limiting Naval Armament, 1922, provides that—

No preparations shall be made in merchant ships in time of peace for the installation of warlike armaments for the purpose of converting such ships into vessels of war, other than the necessary stiffening of decks for the mounting of guns not exceeding 6-inch (152 millimeters) caliber. (1921 N. W. C., International Law Documents, p. 299.)

Many queries have arisen as to the treatment of merchant ships having decks stiffened for 6-inch guns.

It seems to be clear that under article 5 of Sixth Hague Convention, 1907, relative to the status of enemy merchant ships at the outbreak of hostilities, the question might arise. Article 5 is as follows:

The present convention does not affect merchant ships whose construction indicates that they are intended to be converted into ships of war.

The French text, which is official, is:

La presente Convention ne vise pas les navires de commerce dont la construction indique qu'ils sont destinés à être transformés en bâtiments de guerre.

The representatives of the United States at The Hague did not sign this on the ground that it should have been

more positive in its obligations in order to conform with existing law, and Great Britain denounced the convention in 1925 for similar reasons.

This article 5 was proposed by the British delegation in 1907, and the words used were, "navires marchands ennemis susceptibles d'être transformés en vaisseaux de combat." The drafting committee made this read, "navires marchands qui ont été designés d'avance pour être transformés en bâtiments de guerre."

This article 5 was discussed at length in the conference. In the discussion Lord Reay, of the British delegation, said he had—

> no idea of casting suspicion upon the good faith of Governments, but that the British delegation consider vessels capable of conversion as "potential" fighting ships, and, therefore, as forming part of the naval forces of a belligerent. Hence he considers it necessary to stipulate clearly that such vessels do not enjoy the privileged status granted to the other vessels referred to in the project. Article 5 is the essential condition upon which depends the adoption of the project as a whole by his delegation. (3 Proceedings Hague Peace Conferences, Conference of 1907, Carnegie Endowment for International Peace, p. 1020.)

Lord Reay had earlier said "vessels built with a view to war can not escape the treatment to which warships are subjected." (Ibid., p. 941.) In this plenary conference it was explained that it was not the purpose to give exemptions to merchant ships intended for conversion into vessels of war but that these "should be expressly left out of the proposed provisions and kept under the jurisdiction of the present law. That is the object of article 5, according to which the build of the ships in question should serve to indicate their ultimate purpose." (Ibid., vol. 1, p. 250.)

As article 14 distinctly states the purpose of stiffening the decks as "for the purpose of converting such ships into vessels of war," manifestly such vessels would not have the advantages of the days of grace as in the class of regular merchant vessels, and it can scarcely be imag-

ined that a belligerent would accord to such vessels the same privileges in other respects.

Naval unit.—Questions have long been raised as to what constitutes a naval unit. With the Declaration of Paris of 1856 by which a blockade "in order to be binding, must be effective—that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy"—there came questions as to what force was essential to make it sufficient under the terms. The Supreme Court of the United States in 1899 in the case of *The Olinde Rodrigues* (174 U. S. 510) said that "what might be sufficient force was necessarily left to be determined according to the particular circumstances." General Order 492 of the Secretary of the Navy, June 20, 1898, had stated that there must be maintained "a force sufficient to render ingress to or egress from the port dangerous." Early decisions had used similar expressions as "exposure to certain danger," "dangerous to attempt to enter it," "attended with evident danger," "incurring risk." The court would not allow the captured vessel to plead that blockade was not legally effective.

The question as to what might constitute a blockading force has been raised from time to time and was particularly considered at the London Naval Conference, 1908–9. The official report on the Declaration of London, which declaration has not been ratified, said:

> When a government decides to undertake blockading operations against some part of the enemy coast it assigns a certain number of warships to take part in the blockade and intrusts the command of these to an officer whose duty is to insure by this means the effectiveness of the blockade. The commander of the naval force thus formed distributes the ships placed at his disposal according to the configuration of the coast and the geographical position of the blockaded places and gives each ship instructions as to the part which she has to play, and especially as to the zone intrusted to her surveillance. It is all of the zones of surveillance together, organized in such manner that the blockade is effective, that form the radius of action of the blockading naval force.

The radius of action so understood is closely connected with the effectiveness of the blockade, and also with the number of ships employed on it.

Cases may occur in which a single ship will be enough to maintain a blockade effective—for instance, at the entrance of a port or at the mouth of a river with a small estuary—on condition as circumstances allow the blockading ship to stay near enough to the entrance. In that case the radius of action is itself near the coast. But, on the contrary, if circumstances force her to remain far off, it may be that one ship would not be enough to secure effectiveness, and to maintain this it will then be necessary to add other ships. (1909 N. W. C., International Law Topics, p. 49; Br. Parliamentary Papers, Misc. No. 5 [1909], Cd. 4555, p. 255.)

This report and other opinions seem to indicate that the forces engaged in a single operation or under the command of one officer detailed for the operation would be regarded as a unit. The "forces raised or to be raised" might be under a general command but would not be a unit in the sense here used unless engaged in one operation against a single objective. Certainly the ships under a single command and engaged in a single operation would be regarded as a unit.

Questions relating to the distribution of prize money have often given rise to differences of opinion as to what vessels may share as taking part in a capture. "Vessels in sight" were often regarded as participating. During the World War such questions naturally came before the Allies. A convention between France and Great Britain, agreed upon in 1914 and later acceded to by Italy, provided:

ART. 4. When a capture shall be made by a cruiser of one of the allied nations in the presence and in the sight of a cruiser of the other, such cruiser having thus contributed to the intimidation of the enemy and encouragement of the captor, the adjudication thereof shall belong to the jurisdiction of the actual captor.

ART. 5. In case of condemnation under the circumstances described in the preceding articles:

1. If the capture shall have been made by vessels of the allied nations whilst acting in conjunction, the net proceeds of the prize, after deducting the necessary expenses, shall be divided

into as many shares as there were men on board the capturing vessels, without reference to rank, and the shares of each ally as so ascertained shall be paid and delivered to such person as may be duly authorized on behalf of the allied government to receive the same, and the allocation of the amount belonging to each vessel shall be made by each government according to the laws and regulations of the country.

2. If the capture shall have been made by cruisers of one of the allied nations in the presence and in sight of a cruiser of the other, the division, the payment, and the allocation of the net proceeds of the prize, after deducting the necessary expenses, shall likewise be made in the manner above mentioned. (1917 N. W. C., International Law Documents, p. 146.)

The capture of a vessel under such conditions, while regarded as a joint capture, is not the act of a force under a single command but of a force constructively engaged in a single operation resulting in the capture of the prize.

American proposal, 1916.—The Secretary of State made to the ambassadors of the Governments of Great Britain and allied powers in 1916 a proposal in regard to a modus vivendi as to submarines and armed merchant vessels. In this communication he said:

Your excellency will understand that in seeking a formula or rule of this nature I approach it of necessity from the point of view of a neutral, but I believe that it will be equally efficacious in preserving the lives of all noncombatants on merchant vessels of belligerent nationality.

My comments on this subject are predicated on the following propositions:

1. A noncombatant has a right to traverse the high seas in a merchant vessel entitled to fly a belligerent flag and to rely upon the observance of the rules of international law and principles of humanity if the vessel is approached by a naval vessel of another belligerent.

2. A merchant vessel of enemy nationality should not be attacked without being ordered to stop.

3. An enemy merchant vessel, when ordered to do so by a belligerent submarine, should immediately stop.

4. Such vessel should not be attacked after being ordered to stop unless it attempts to flee or to resist, and in case it ceases to flee or resist the attack should discontinue.

5. In the event that it is impossible to place a prize crew on board of an enemy merchant vessel or convoy it into port, the

vessel may be sunk, provided the crew and passengers have been removed to a place of safety. (1916 U. S. For. Rel., Sup., p. 146.)

The American proposal, in the opinion of the French ambassador, seemed to raise questions that were not easy. The ambassador said:

> The chief difficulty will be what guaranty shall we have that the contemplated agreements, which are simply a reenactment of old established rules, will henceforth be observed? Shall we have yours? If so, well and good, but I doubt you will undertake such a risky thing. * * * The question of the place of safety is also a difficult one. Up to now the Germans have understood by this the packing of people in small boats abandoned in the open sea where they have died by the hundred, more than probably a cruel, lingering death, many of them. The German note concerning the *Frye* announces the abandonment of this particular part of the frightful system of that nation. But it is not clear what or whom this applies to. It seems as if only ships under the American flag were to benefit by it. If you could let me know how you interpret the promise, I should be very thankful and it might be of real use. (Ibid. p. 149.)

The proposal of the United States did not seem reasonable to the British Government, and the American ambassador in London reported that the pressing of the American proposal would be regarded by the Allies as yielding to German influences and as more or less unfriendly interference.

German attitude, 1916.—On February 4, 1916, just a year after the announcement of submarine warfare by Germany, the German ambassador in Washington, in a communication to the Secretary of State, said that the German submarine war against England's commerce at sea "is conducted in retaliation of England's inhuman war against Germany's commercial and industrial life. It is generally recognized as justifiable that retaliation may be employed against acts committed in contravention of the law of nations. Germany is enacting such retaliation because it is England's endeavor to cut off all imports from Germany by preventing even legal commerce of the neutrals with her and thereby subjecting

the German population to starvation. In answer to these acts Germany is making efforts to destroy England's commerce at sea, at least as far as it is carried on by enemy vessels. If Germany has notwithstanding limited her submarine warfare, this was done in view of her long-standing friendship with the United States and in view of the fact that the sinking of the *Lusitania* caused the death of citizens of the United States. Thereby the German retaliation affected neutrals which was not the intention, as retaliation must not aim at other than enemy subjects." (1916, U. S. For. Rel. Sup., p. 157.)

Armed merchant vessels and submarines.—During the World War, 1914–1918, there was much discussion of the relations of armed merchant vessels and submarines. It was readily admitted that a shell from a gun of even small caliber might destroy a submarine. Some states have permitted arming of merchant vessels with guns not exceeding 6 inches. The right of an enemy merchant vessel to resist by force visit and search has long been recognized and was formerly grounded upon the need of protection against pirates and privateers. In the days just before the World War British officials had argued that "the proper reply to an armed merchantman is another merchantman armed in her own defense," and that "surely these ships will be quite valueless for the purpose of attacking armed vessels of any kind." In 1914 Mr. Churchill, First Lord of the British Admiralty, said: "These are armed solely for defensive purposes. Their guns are mounted in the stern and can fire only on the pursuer." (59 Parliamentary Debates, Commons, 1914, p. 1925.) In 1916 the German Foreign Office communicated to the American ambassador in Germany what purported to be copies of instructions to British merchant vessels, found on board the English steamer *Woodfield.*

In no circumstances is this paper to be allowed to fall into the hands of the enemy.

This paper is for the master's personal information. It is not to be copied, and when not actually in use is to be kept in safety in a place where it can be destroyed at a moment's notice.

Such portions as call for immediate action may be communicated verbally to the officers concerned.

April, 1915.

INSTRUCTIONS REGARDING SUBMARINES APPLICABLE TO VESSELS CARRYING A DEFENSIVE ARMAMENT

1. Defensively armed vessels should follow generally the instructions for ordinary merchant ships.

2. In submarine waters guns should be kept in instant readiness.

3. If a submarine is obviously pursuing a ship by day, and it is evident to the master that she has hostile intentions, the ship pursued should open fire in self-defense, notwithstanding the submarine may not have committed a definite hostile act, such as firing a gun or torpedo.

4. In view of the great difficulty in distinguishing a friend from an enemy at night, fire should not be opened after dark unless it is absolutely certain that the vessel fired at is hostile.

5. Before opening fire the British colors must be hoisted.

It is essential that fire should not be opened under neutral colors.

6. If a defensively armed vessel is pursued by a submarine the master has two alternatives:

(*a*) To open fire at long range immediately it is certain that the submarine is really in pursuit.

(*b*) To retain fire until the submarine has closed to a range, say, 800 yards, at which fire is likely to be effective.

In view of the very great difficulty of distinguishing between friendly and hostile submarines at long range (one British submarine has already been fired at by a merchant vessel which erroneously supposed herself to be pursued by the submarine), it is strongly recommended that course (*b*) should be adopted by all defensively armed ships.

7. A submarine's flag is no guide to her nationality, as German submarines frequently fly British colors.

8. Vessels carrying a defensive armament and proceeding to neutral ports must not be painted in neutral colors or wear a neutral flag.

9. It is recommended that in neutral ports, particularly those of Spain, the armament should be concealed as far as possible.

A canvas cover is recommended for this purpose. (1916 U. S. For. Rel., Sup., p. 196.)

The German ambassador handed to the Secretary of State of the United States on January 7, 1916, the following statement:

(1) German submarines in the Mediterranean had from the beginning orders to conduct cruiser warfare against enemy merchant vessels only in accordance with general principles of international law, and in particular, measures of reprisal, as applied in the war zone around the British Isles were to be excluded.

(2) German submarines are therefore permitted to destroy enemy merchant vessels in the Mediterranean; i. e., passenger as well as freight ships as far as they do not try to escape or offer resistance, only after passengers and crews have been accorded safety.

(3) All cases of destruction of enemy merchant ships in the Mediterranean in which German submarines are concerned are made the subject of official investigation and, besides, submitted to regular prize court proceedings. In so far as American interests are concerned, the German Government will communicate the result to the American Government. Thus, also, in the *Persia* case if the circumstances should call for it.

(4) If commanders of German submarines should not have obeyed the orders given to them, they will be punished; furthermore, the German Government will make reparation for damage caused by death of or injuries to American citizens. (1916 U. S. For. Rel., Sup., p. 144.)

Submarines and the Washington Conference on Limitation of Armaments, 1921–22.—In the early meetings of the Conference on the Limitation of Armaments, 1921–22, there had been discussion as to the use or abolition of submarines. There was also an understanding that if the use of submarines was not prohibited rules regulating their use would later be introduced.

Mr. Root said that the resolutions he was about to read were based on two lessons taught by the Great War. One fact which seemed very clear was that mere agreements between governments, rules formulated among diplomats in the course of the scientific development of international law, had a very weak effect upon belligerents when violation would seem to aid in the

attainment of the great object of victory. This has been clearly demonstrated in the war of 1914–1918.

Another fact established by the war was that the opinion of the people of civilized nations had tremendous force and exercised a powerful influence on the condition of the belligerents. The history of propaganda during the war had been a history of an almost universal appeal to the public opinion of mankind, and the result of the war had come largely as a response.

The public opinion of mankind was not the opinion of scientific and well-informed men but of ill-informed men who formed opinions on simple and direct issues. If the public could be confused, public opinion was ineffective; but if the public was clear on the fundamentals of a question, then the opinion of mankind was something which no nation could afford to ignore or defy.

The purpose of the resolutions he was about to read was to put into such simple form the subject which had so stirred the feelings of a great part of the civilized world that the man in the street and the man on the farm could understand it.

The first resolution, Mr. Root said, aimed at stating the existing rules, which, of course, were known to the committee, but which the mass of people did not know, in such a form that they would be understood by everyone.

Mr. Root then read the following:

"I. The signatory powers, desiring to make more effective the rules adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war, declare that among those rules the following are to be deemed an established part of international law:

"1. A merchant vessel must be ordered to stop for visit and search to determine its character before it can be captured.

"A merchant vessel must not be attacked unless it refuses to stop for visit and search after warning.

"A merchant vessel must not be destroyed unless the crew and passengers have been first placed in safety.

"2. Belligerent submarines are not under any circumstances exempt from the universal rules above stated; and if a submarine can not capture a merchant vessel in conformity with these rules the existing law of nations requires it to desist from attack and from capture and to permit the merchant vessel to proceed unmolested.

"The signatory powers invite the adherence of all other civilized powers to the foregoing statement of established law to the end that there may be a clear public understanding throughout the world of the standards of conduct by which the public opinion of the world is to pass judgment upon future belligerents."

This, Mr. Root said, was a distinct pronouncement on the German contention during the war in regard to the conflict between the convenience of destruction and the action of a belligerent under the rules of international law. (Conference on Limitation of Armament, 1921–1922, p. 594.)

The preamble of Mr. Root's resolution was in part embodied in the preamble of the treaty as finally adopted by the conference and in part embodied in Article I. The proposed treaty, which was not ratified, clearly states that it desires "to make more effective the rules adopted by civilized nations," and in Article III provides penalties for failure to observe these rules. These penalties were to be applicable not alone to those in the submarine service but to all branches or to "any person in the service of any power." The ratification of this treaty would have made the rules and the sanction general.

The preamble of the proposed treaty stated that it is the desire of the five powers signing the treaty "to make more effective the rules adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war."

Article I, if ratified, would for the five powers declare certain "rules adopted by civilized nations," and that "the following are to be deemed an established part of international law."

The statements in Article I are not necessarily correct statements of the law, even though so declared by the five powers, as is evident from Articles II and III, which, if the rules are adopted, unnecessarily invite assent of other civilized powers, because, if "established," as stated in the English text of Article I, or, as "forming a part of," as stated in the French text, no assent would be necessary, but could be assumed.

Neutrals and noncombatants may be on either belligerent or neutral merchant vessels. In Article I (1) there is no distinction made as to whether the merchant vessel is under neutral or belligerent flag, and there is unquestionably a difference in the permissible treatment of vessels under neutral and under belligerent flags.

An enemy merchant vessel under existing international law may be seized without previous orders to submit to visit and search. Article I of the treaty provides that a merchant vessel, without distinction as to flag, "must be ordered to submit to visit and search before it can be seized," thus introducing a new limitation applying to all vessels of war. Further, it has been common to seize even neutral merchant vessels without visit and search if evidence in possession of the vessel of war is sufficient to warrant seizure, on orders from the Government, or on suspicion, at the risk of the seizing party, which might be contrary to the provision of Article I.

Article I does not, however, necessarily *require* visit and search before seizure, but does require that the vessel "be ordered to submit to visit and search to determine its character before it can be seized." Often it is not the character of the vessel that is in question but the nature of the cargo, the destination, etc. A strict interpretation places a still further limitation upon the action of the seizing vessel that the visit and search be to determine the character of the merchant vessel, and in the division (2) this is stated to be among "the universal rules," nonconformity to which requires that the vessel be allowed to proceed.

The general implication from the wording is that the rules of Article I are to be deemed to be established "for the protection of lives of neutrals and noncombatants," whereas the rules in regard to visit and search have been developed primarily for the dealing with property rather than for protection of life.

While the original proposition of Mr. Root stated that the merchant vessel "must be ordered to stop for visit and search to determine its character before it can be captured," in the final text this word "captured" was changed to "seized." Mr. Hanihara had suggested the change from "capture" to "seize."

The original proposition of Mr. Root also stated: "A merchant vessel must not be attacked unless it refuse to

stop for visit and search after warning." To this was later added the words, "or to proceed as directed after seizure."

In the next clause there was no change.

In the last paragraph numbered (2), the word "capture" at the end of the paragraph was changed to "seizure." The word "capture" in the second clause was not changed.

Mr. Root at the meeting of December 29, 1921, speaking of Resolution I, said:

> This article did not purport to be a codification of the laws of nations as regards merchant vessels, or to contain all the rules. It said that the following were to be deemed among the existing rules of international law.

Speaking further of these rules of Resolution I, Mr. Root said: "The public opinion of the world said that the submarine was not under any circumstances exempt from the rules above stated; and if so, a submarine could not capture a merchant vessel." Mr. Root said:

> Resolution I also explained in authorized form the existing law and could be brought forward when the public asked what changes were proposed. (Conference on the Limitation of Armament, p. 618.)

Sir John Salmond, while not doubting the substantial accuracy of the resolutions proposed by Mr. Root, regarded them as not free from ambiguities and formal defects. He asked whether under Resolution I, stating that "'a merchant vessel must not be destroyed unless the crew and passengers had been first placed in safety,' was this intended to give absolute immunity from attack to the merchant ship unless the crew and passengers were first placed in safety, even although the ship had refused to stop on being warned? Read literally, this would be the effect of the rule."

Senator Lodge said: "The rules laid down by Mr. Root, especially in Resolution I, were elementary. Anyone who had read a textbook of international law knew them." (Ibid. p. 620.)

Mr. Hughes said:

Such a declaration as the one proposed in the first resolution would go to the whole world as an indication that, while the committee could not agree on such limitation, there was no disagreement on the question that submarines should never be used contrary to the principles of law governing war. The adoption of the resolution might, furthermore, avoid misunderstanding on the part of those who were looking to the conference with great hope. It certainly could not be considered as a vain declaration, after the experiences with submarines which the powers there represented had had and the feelings engendered by those experiences, to declare in the most precise terms that the rules of international law should be observed. He believed that such a declaration would be of the greatest value. (Ibid. p. 636.)

When the drafting subcommittee reported on January 5 on the Resolutions I and II, which subsequently became Articles I and II of the treaty, Mr. Root stated that—

the subcommittee had agreed unanimously on these two resolutions, but that Senator Schanzer had requested that the following entries be made in the minutes of the subcommittee (regarding Resolution I):

"It is declared that the meaning of article 2 is as follows: Submarines have the same obligations and the same rights as surface craft."

And:

"With regard to the third paragraph of article 1, it is understood that a distinction is made between the deliberate destruction of a merchant vessel and the destruction which may result from a lawful attack in accordance with the rules of the second paragraph. If a war vessel, under the circumstances prescribed in paragraph 2 of article 1, lawfully attacks a merchant vessel, it can not be held that the war vessel, before attacking, should put the crew and passengers of the merchant vessel in safety." (Ibid., p. 686.)

Senator Schanzer stated, in addition, that the Italian delegation understood the term "merchant vessel" in the resolution to refer to unarmed merchant vessels. (Ibid., p. 688.)

As Mr. Root had stated of this first article: "The first was a declaration of existing law and created nothing, merely certifying to what existed." (Ibid, p. 640), and as Sir John Salmond, also a distinguished jurist, has said he did not find the resolutions "free from ambiguities,"

and as the Japanese delegation, as well as the Italian, had raised questions, there might be proper room for doubt as to whether the first resolution clearly stated the existing law.

There was also a difference of opinion between Senator Schanzer and Lord Lee as to armed merchant vessels.

Lord Lee said he would now develop his second point. He was not sure if he had understood Senator Schanzer to say that the Italian delegation only accepted Resolution I on condition of a drastic change in international law under which merchantmen would not have the right to be armed against attack from any quarter. The arming of merchant ships was not a purely British practice; it was recognized in the Italian Code of 1877, which laid down that a merchant ship which was attacked might be ordered to defend itself and even to seize the enemy. He did not suppose that Senator Schanzer proposed to destroy the privilege allowed the merchantmen to defend themselves.

Senator Schanzer said that he would like to observe, with respect to what Lord Lee had said, that a limitation of the armament of auxiliary vessels had already been fixed. It had been agreed that they might not carry guns of more than 8-inch caliber. No rules, however, had been established governing the principles to be applied to merchant vessels, nor had they been forbidden to carry armament above a certain caliber. This omission might be dangerous, and even change their character. There were merchant vessels of 45,000 tons which might carry armament even heavier than 8 inches. Were these merchant vessels or not? The committee had established that a submarine should not attack a merchant vessel except in conformity with a resolution which had been adopted. Yet a merchant ship with guns was a war vessel. Might not a cruiser attack such a vessel? This was a point which Senator Schanzer believed should be cleared up. He said that he could not agree that a merchant vessel, even one armed with 6-inch guns, had rights which a surface cruiser must respect. It was aimed to lay down rules for the advantage of merchant vessels, not of vessels of war. He said that he felt that a declaration was necessary concerning this matter.

Lord Lee said he thought the difference between Senator Schanzer and himself was not really so great as appeared. Senator Schanzer appeared to him, perhaps, to have confused two things. It had been considered absurd to limit the armament of light cruisers and not to impose any limitation on the armament of merchant ships. When this question, which was a purely

technical one, came to be discussed he would be willing to apply the principle that the armed merchant cruiser must not be more powerful than the light cruiser. He understood, however, that Senator Schanzer had said that merchant ships must not be armed at all. That would involve an alteration of international law which the British Empire delegation could not possibly accept.

Senator Schanzer said he did not deny that under the existing rules of international law a merchant vessel might properly carry a limited armament for defensive purposes, but he wished to say that the Italian interpretation of the term "merchant vessel" took into account this limitation. He therefore repeated that the Italian interpretation was in accord with his preceding declaration and with the existing rules of international law.

The chairman stated that he supposed that this subject, which presented endless opportunities for exposition, might be left with the suggestion that under this resolution merchant vessels remained as they now stood under the existing rules of law, with all their rights and obligations; that the resolution then undertook to state what might be done by submarines in relation to merchant vessels thus placed. The chairman thought it hardly necessary that the committee should enter into a discussion of the question. Although he had no desire to preclude discussion of any sort, yet he hardly thought it necessary to enter into a review of all the rules of international law as to merchant vessels and their rights and obligations. He assumed that all the representatives present accepted the proposition that merchant vessels, as merchant vessels—a category well known—stood where they were under the law, and that this resolution defined the duties of submarines with respect to them.

The chairman thereupon put Resolution I to vote.

The chairman assented on behalf of the United States.

Mr. Balfour assented for the British Empire.

Mr. Sarraut said that the French delegation would give its full adherence to Resolution I, but that an interesting discussion had just taken place, the results of which he had not quite understood. He suggested that if Senator Schanzer's statements were not attached to the resolutions they should be recorded in the minutes.

The chairman replied that the question was on the adoption of of the resolution and asked whether France assented.

Mr. Sarraut replied that it did.

Senator Schanzer, speaking for Italy, and Mr. Hanihara, speaking for Japan, assented.

The chairman stated that Resolution I was unanimously adopted. (Ibid., p. 690–694.)

By Article II all other civilized powers were invited to assent to the rules of Article I as being a statement of established law, so that "there may be a clear public understanding throughout the world of the standards of conduct by which the public opinion of the world is to pass judgment upon future belligerents."

In speaking of Article III, which makes violation of existing law piracy, Mr. Root said: "They were not making law, they were making a declaration regarding existing law, and that necessitated no limitation at all to the powers that were here." (Ibid., p. 720.) It is difficult to determine under what authority five powers, however humane, might have presumed to decide for other powers the penalties for acts when they have not been consulted upon the formulation of the law defining these acts.

In voting on Article III—

Senator Schanzer said that he accepted in the name of the Italian delegation the new formula as worked out by Mr. Root and Sir John Salmond, which gives entire satisfaction, as its wording had the effect of extending the sanctions of trial and punishment to all persons violating the rules of law laid down in the first resolution, without distinction.

The chairman asked whether any further discussions were desired. No reply being made, he said that the matter would be put to vote, whereupon the delegations of the United States of America, the British Empire, France, and Italy assented.

Mr. Hanihara said that before speaking for the Japanese delegation he would like to be enlightened as to the exact meaning of the words "punishment as if for an act of piracy."

The chairman said he assumed the phrase to mean that violation of the laws of war, thus declared, should be treated as amounting to an act of piracy and that the person violating the laws would be subject to punishment accordingly.

Mr. Root interposed that such a person would not be subject to the limitations of territorial jurisdiction. The peculiarity about piracy was that, though the act was done on the high seas and not under the jurisdiction of any particular country, nevertheless it could be punished in any country. That was the really important point. (Ibid., p. 728.)

In presenting the treaty in its final form to the fifth plenary session, February 1, 1922, Mr. Root said:

> You will observe that this treaty does not undertake to codify international law in respect of visit, search, or seizure of merchant vessels. What it does undertake to do is to state the most important and effective provisions of the law of nations in regard to the treatment of merchant vessels by belligerent warships, and to declare that submarines are under no circumstances exempt from these humane rules for the protection of the life of innocent noncombatants.
>
> It undertakes further to stigmatize violations of these rules, and the doing to death of women and children and noncombatants by the wanton destruction of merchant vessels upon which they are passengers, as a violation of the laws of war which, as between these five great powers and all other civilized nations who shall give their adherence thereto, shall be henceforth punished as an act of piracy. (Ibid., p. 268.)

The statement that the following is an established part of international law, viz, "A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized" is not in accord with the facts at present or prior to the war.

Certainly this was not the rule in regard to enemy merchant vessels which might be seized as such without orders to submit to visit and search. The Japanese and other rules prescribe: "All enemy vessels shall be captured." Visit and search of enemy merchant vessels was to avoid violation of any neutral rights.

A neutral merchant vessel might be seized at any time outside of neutral jurisdiction, but in such case the state making the seizure assumed all risk, and visit and search was to avoid risk. If a neutral merchant vessel was known to the belligerent to have violated blockade, carried contraband, or to have engaged in unneutral service, it could be seized without being ordered to submit to visit and search.

This visit and search may not be solely to determine the character of the ship, for this may be known already, but to determine its destination, cargo, etc.

In 1799, Sir William Scott, in the case of the *Maria*, said:

> That the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestible right of the lawfully commissioned cruisers of a belligerent nation. (1, C. Robinson's Admiralty Reports, 340.)

This statement did not mean that the merchant vessel had a right to demand that it should be ordered to submit to visit and search before seizure, but that the belligerent cruiser had a right to visit and search, and the belligerent cruiser also had, and has often exercised, the right of seizure without visit and search. The visit and search has been resorted to to avoid liability of making an illegal seizure. If a cruiser cares to take the risk of illegal seizure it may do so at any time, without visit and search, under the law existing in 1922 and until such treaty should be generally ratified.

The next clause provides:

> A merchant vessel must not be attacked unless it refuse to submit to visit and search after warning, or to proceed as directed after seizure. (Conference on Limitation of Armament, p. 1608.)

The French version of this is equally official with the English, but the idea is more nearly in accord with the law:

> Un navire de commerce ne peut être attaqué que si, après mise en demeure, il refuse de s'arrêter pour se soumettre à la visite et à la perquisition, ou si, après saisie, il refuse de suivre la route qui lui est indiquée.

It is, however, not a "refusal" to come to for visit and search, but merely a failure to come to that renders the vessel liable under nearly all regulations.

The word "refuse" is, however, a fortunate one, as under this phraseology liability under the Kirkwall practice would not easily arise. A vessel might be directed to proceed to Kirkwall, or some other port, and might not "refuse," but might after a time depart from the

route indicated. As this clause, "or to proceed as directed after seizure," did not occur in the original draft it may be inferred that it was introduced to gain recognition of an extension of the Kirkwall practice, which certainly was not, and is not, "an established part of international law." If the seizing vessel accompanies the seized merchant vessel or puts a prize crew on board, then the law is as stated.

The paragraph stating: "A merchant vessel must not be destroyed unless the crew and passengers have been first placed in safety," manifestly is not intended to be a general prohibition, because the preceding paragraph permits by implication destruction under certain conditions.

This proposed treaty of 1921–22 in relation to the use of submarines and noxious gases in warfare failed of adoption and the regulation of the use of submarines was left for later determination.

American advisory committee, Washington Conference on the Limitation of Armament.—A subcommittee investigating and making a report in regard to submarines to the American advisory committee at the Washington Conference, 1921, said:

> The rules of maritime warfare require a naval vessel desiring to investigate a merchant ship first to warn her by firing a shot across her bow, or in other ways, and then proceed with the examination of her character, make the decision in regard to her seizure, place a prize crew on her, and, except under certain exceptionable circumstances, bring her into port, where she may be condemned by a prize court. * * *
>
> Assuming that a merchant ship may be halted by a submarine in a legitimate fashion, it becomes difficult because of limited personnel for the submarine to complete the inspection, place a prize crow on board, and bring her into port. It is also difficult for her to take the passengers and crew of a large prize on board should circumstances warrant sinking the vessel. However, these remarks are applicable to small surface crafts as well. (Conference on the Limitation of Armament, p. 494.)

Inability to afford place of safety.—Manifestly the argument that a vessel of war because weak should have

special belligerent rights as regards neutrals or opposing belligerents has little weight. Professor Hyde, in referring to submarines, has said:

> Mere incapacity of a naval submarine to offer a place of refuge on its own decks does not justify a disregard of the safety of the persons aboard the enemy merchantman which has surrendered or obeyed a signal to stop. It indicates rather a limitation of the right to destroy the ship until by some process the safety of its occupants has been assured. Should a small surface craft, such as a typical destroyer, or a naval vessel even more diminutive, fall in with an enemy passenger liner having 2,000 persons aboard, the inability of the former to offer a place of refuge to a majority of those persons, or to spare an adequate prize crew, would not in itself be deemed to justify the demand that the occupants of the liner take to the boats, or otherwise jeopardize their safety in order to permit the destruction of the vessel on which they were carried. The submarine is subject to the same duty. (2 Hyde, International Law, p. 482.)

Summons.—In many of the old treaties it is stipulated that a visiting vessel shall not come nearer to the visited vessel than a cannon shot, though some prescribe half a cannon shot. The requiring that the national flag should be flown when firing a gun in action was general. These rules were developed when the range of guns was short, and the rules were not universal though they might be regarded as general. With the increase in range of guns, it is not possible to send with safety and convenience a visiting party even half the distance which a shot may cover and no specified distance is now required. The reason for the early precautions have largely passed with pirates and privateers. While the summoning or affirming gun is often fired, other methods are equally valid. The purpose of the summoning gun was to make known to the summoned vessel that the summoning vessel desired her to come to and there was the implied threat that force would be used to bring the vessel to if the summons was manifestly disregarded and this could lawfully be done. Any other method of effecting summons would be equally lawful, as by signal or otherwise,

but, of course, the summons must be received and must be understood. If certainly received and understood, the consequences of disregarding the summons would be the same whatever the means of communication.

Detention.—The terms capture, seizure, and detention are not uniformly applied or interpreted. Capture and seizure are often used interchangeably. In general it is maintained that a vessel of war should interfere as little as possible with neutral commerce and that the exercise of visit and search should not be made unnecessarily burdensome. If on visit and search no good ground for suspicion that the vessel is liable to capture is found, formerly it was held that the vessel should be allowed to proceed.

During the World War it was argued on various grounds, size, state of sea, danger from submarines, methods of shipment of cargo, etc., that the visit and search at the place where the vessel is summoned is not an adequate safeguard for belligerents. Detention on the ground of suspicion based on irregular papers or other evidence arising from the visit and search at the place where the vessel is brought to has been uniformly approved, but the adequacy of the grounds for suspicion might be contested. Cases had arisen where vessels were detained and taken from the place of bringing to when search had been interrupted by storm, threatened attack by the enemy, or force majeure.

A somewhat extreme interference arose in case of the *Montana* in 1915. The statement of the case as reported in the decision by His Majesty's Commercial Court at Malta in Prize is as follows:

> Action by the Archipelago American Steamship Co., the owners of the steamship *Montana*, against the commanding officers of H. M. S. *Harrier* and H. M. S. *Triad*, claiming damages for the detention of their vessel.
>
> On April 15, 1915, the *Montana* left the Piræus, having on board 90,000 kilos of common soda consigned to Vourla, in Turkey. Before accepting the said consignment the master and ship's

agent communicated with the British Legation at Athens and received an assurance from the British Minister that common soda was not contraband and might safely be carried to the proposed destination. In the course of her voyage the *Montana* was stopped by H. M. S. *Harrier* in the Doro Channel and ordered to Mudros for examination. The naval authorities at Mudros, having no means at their disposal of analyzing the cargo, sent the vessel to Malta, where she arrived on April 22. On April 24 the Government analyst reported that the cargo did not come within the list of sodium substances included in the schedule of contraband, and on April 25 the *Montana* was released and given a clearance certificate for Vourla. On May 4 the vessel, after calling at Chios, was again stopped by H. M. S. *Triad*, but was allowed to proceed to Vourla after her holds had been sealed, which prevented the discharge of the cargo. The master of the vessel alleged that the commanding officer of the *Triad* ordered him to leave Vourla within 24 hours, but this was denied by the naval officer in question. (3 Grant, Br. and Col. Prize cases, p. 340.)

This court decided that "the naval authorities, therefore, acted within their powers in detaining the ship and sending her for examination to Malta."

Later the court states that in regard to sealing the cargo to prevent discharging at Vourla "it is impossible to define which facts constitute reasonable suspicion, as they are so multifarious as to render it impossible to give an exhaustive enumeration of all," and also as to the contention that the order was against the principles of international law, "It does not, however, seem repugnant to those principles to hold that the right of visit and search includes that of securing such part of the cargo which may appear suspicious and of preventing its being discharged as at a given port, without actually seizing it." The court added:

> Recent developments in the course of the present war have clearly shown that it is not possible in all cases to exercise the right of visit and search in a satisfactory way owing to the ease with which contraband may be concealed in bales, passengers' luggage, and other receptacles, especially in large ships, and owing to the danger from enemy submarines.

The claim for damages made by the owners of the *Montana* was, according to the court, not substantiated.

Capture.—Just what may be necessary to constitute capture may at times be difficult to determine. The British judgment by the judicial committee of the Privy Council in the case of the *Pellworm*, which in 1917 with other ships had passed into Dutch territorial waters before they were boarded, gives an opinion as to the nature of capture, and the discussion is extended and significant:

> In principle it would seem that capture consists in compelling the vessel captured to conform to the captor's will. When that is done, deditio is complete, even although there may be on the part of the prize an intention to seize an opportunity of escaping should it present itself. Submission must be judged by action, or by abstention from action; it can not depend on mere intention, although proof of actual intention to evade capture may be evidence that acts in themselves presenting an appearance of submission were ambiguous and did not result in a completed capture. The conduct necessary to establish the fact of capture may take many forms. No particular formality is necessary—*La Esperanza.* (1 Hag. Adm., at p. 91.) A ship may be truly captured, although she is neither fired on nor boarded—*The Edward and Mary*—if, for example, she is constrained to lead the way for the capturing vessel under orders, or to follow her lead, or directs her course to a port or other destination, as commanded. If she has to be boarded, she is at any rate taken as prize when resistance has completely ceased. It was contended before their lordships by counsel for the Crown that hauling down the flag was conclusive in the present case, or, at least, was conclusive when taken in conjunction with stopping the engines as ordered. It was said to be an unequivocal act of submission, as eloquent as the words "I surrender" could have been, an act which could not be qualified by any intention which did not find expression in action. This is to press *The Rebeckah* beyond what it will bear, for there the facts showed, that after the act of formal submission by striking colors there was no discontinuance of that submission either effectively or at all, whereas Sir William Scott intimates that, if any attempt had been made to defeat the surrender he would not have treated the deditio as complete until possession was actually taken. It is true that by tradition, when ships are engaged in combat, striking the colors is an accepted sign of surrender, but to do so without also ceasing resistance is to invite and to justify further severe measures by the victori-

ous combatant. In the case of a merchantman, where the traditions of commissioned men-of-war are not of equal application, the hauling down of the flag, like any other sign or act of submission, is to be tested by inquiring whether the prize has submitted to the captor's will. What a combatant seeks to intimate by acts signifying surrender is first and foremost that he ceases to fight and submits to be taken prisoner; what a merchantman intimates is that she means to do as she is told, and that the chattel property may be captured in prize, although the seamen in charge of it are not made prisoners or placed under personal restraint. In the present case, according to evidence given for the Crown, the hauling down of their flags by the German steamers was accompanied by a change of course toward the land; and as it preceded any British signal by flag or cannon shot, it was in the circumstances anything but a clear intimation of submission. On the contrary, it is obvious that the German ships continued to move toward and shortly crossed the 3-mile limit, and that this was neither inadvertent nor was incapable of being prevented. They had not abandoned the intention of escaping, nor had they arrested their movement toward the region of safety. They submitted just so far as to minimize the risk of being fired on; they disobeyed orders just so far as to insure that the ships would of themselves glide or be carried over the line. They were already heading toward the territorial waters and desired to obtain whatever advantage might be derivable from getting within them. This was why they did not obey the order to alter course to the westward. It is shown that they could not have done so. Under these circumstances their lordships see no reason to differ from Lord Sterndale's conclusion that the vessels were not captured until they had entered Dutch waters, for up to that time they were endeavoring to escape and were resisting or evading submission to the captor's will. (3 Grant, Br. and Col. Prize Cases, p. 1053.)

Classes of ships.—A review of the discussion on privateering, exemption of private property at sea, conversion of merchant vessels into vessels of war, armed merchant vessels, subsidized vessels, national merchant marine and kindred subjects shows the need of a redefinition of some of these classes. This review also shows that the line should for purposes of war and for observance of neutrality be on the basis of combatancy. If a vessel is a combatant vessel it should be treated as such both by

belligerent and by neutral. While the distinction between armament for defensive and offensive purposes was ostensibly made in the World War, in most cases the practice reduced to the exercise of judgment by the commander of the armed vessel as to his ability to sink or defeat an approaching vessel. The result was unrestricted maritime warfare with disregard of belligerent and neutral rights.

The desideratum seems to be a clear distinction between combatant and noncombatant vessels. Such a distinction is necessary both for neutral and belligerent. Clearly a vessel of belligerent nationality should be either noncombatant or combatant if a neutral is to maintain an unquestioned neutrality. The best interests of the belligerents would as between themselves be likewise served by such definition. Combatant vessels would be liable to attack without warning; noncombatant vessels would be liable only to visit and search and capture. Noncombatant vessels could be sunk under exceptional circumstances and after personnel had been placed in safety; noncombatant vessels belonging to the state would be treated as public property.

Referring to The Hague Convention in regard to days of grace in which the term "bâtiments de guerre" is used J. A. Hall says:

> The words "bâtiments de guerre" are probably intended here to cover only fighting ships, and do not include auxiliary vessels not employed in acts of aggression. But even so, it is impossible to say in general terms what details of construction should be taken to indicate that the vessel is intended to be converted into a ship of war, for most fast vessels, such as mail steamers and large liners, are easily converted into formidable commerce destroyers. Indeed, the difficulty will be almost insoluble in the future, if the practice of putting special construction into merchant ships to facilitate their defensive armament in time of war becomes general. Difficulties may also arise in the case of vessels of smaller size, such as trawlers, which play so important a rôle in all mining operations. It is not, however, the capacity of the vessel to be converted, but the intention by the Government to make such conversion to war uses, which is the test. Each case

will have to be decided on that very vague and unsatisfactory ground, but the fact that the vessel is contained in the navy list of its country or is in receipt of a government subsidy should certainly be sufficient proof of intention to warrant condemnation. Fortunately these problems will seldom confront the naval officer, but will be left for the prize court to decide. For if no days of grace are granted all enemy vessels should be captured and sent in for prize proceedings, for if not liable to condemnation they are at any rate subject to detention for the duration of the war. If, on the other hand, there is a period of grace, the problem can equally well be prevented from harassing the naval officer by some such method as that adopted in the British Order in Council set out above, namely, the exclusion from the privilege of all vessels over a certain size or speed or otherwise specially suitable for conversion into ships of war.

Apart from this question of conversion, it is lawful for a naval officer, exercising the right of visit and search in time of war, to capture and send in for condemnation as prize every enemy merchant ship which he may meet with outside neutral territorial waters after the expiration of any days of grace his government may have granted, or, if none are granted, immediately after the declaration of war, unless he is satisfied either that she left her last port of call before the existence of the war could be known there and is still ignorant of it, or that she had sailed from a port of her enemy with a passport and has not willfully made any material deviation from the course there laid down for her. If she has failed to comply with the terms of the passport without a reasonable excuse, she should be seized. The first exception, that of ignorance of the war, did not apply in the Great War, as already described, owing to the two belligerents, Germany and Russia, having refused to agree to it at The Hague Conference. In any war in which the convention was fully in force, unless it was decided to exercise the minor right of detention under article 3, an officer visiting an enemy ship which was ignorant of the war, should enter in the ship's log the fact of the visit and of the state of war, specifying the date and place of the visit, together with the names of his ship and her commanding officer, signing the entry with his own name and rank. The visited vessel will then be liable to be seized as prize, if she thereafter enters or attempts to enter a port of her enemy, for she is no longer in a position to plead ignorance and should make for a place of safety. If her destination is a port of her own country, it may be necessary, owing to a blockade, to divert her to another port, or for other military reasons to prescribe her route, in which case any such orders should be also entered in her log. She will then

be liable to capture and condemnation as prize if she is subsequently discovered to be acting in contravention of such orders without reasonable excuse. (J. A. Hall, The Law of Naval Warfare, p. 36.)

Hall also says:

Hostilities are mainly conducted by the regular navy of a state, vessels built and equipped simply and solely for the purposes of war. They fly a distinctive flag—in the British Navy the white ensign. They alone are entitled to attack the enemy, to exercise the right of visit and search, or to take prizes. These are the fighting ships. Other vessels, such as transports, colliers, oil-fuel vessels, tugs, and so forth, required for the numerous subsidiary nonmilitary services which the working of a great navy demands, constitute the second class, known in the British Navy as fleet auxiliaries. Whether they have been merely taken over on charter from the merchant service for the purposes of the war or have always been in the sole ownership and employment of the naval authorities, they are not permitted to engage in acts of war, nor do they fly the flag of a fighting ship. Whether they fly a special flag or the flag of their merchant service the rights and duties of their position remain the same; in regard to the enemy they are in the position of merchant ships; that is to say, they may be captured or destroyed and may resist if attacked, but must not themselves begin an attack, but in regard to neutrals and the use of their ports and waters they are in the same position as the fighting ships. (Ibid. p. 48.)

This right to exercise forcible resistance must clearly come into operation the moment the hostile warship proceeds to take any step toward effecting capture; that is, approaches with a view to exercising the right of visit and search or to bringing her guns to bear. It is perfectly lawful to presume her hostile intent without waiting for her to announce it formally by signal or by firing a warning shot. This is as true with regard to hostile submarine as to surface vessels, especially if they are notoriously in the habit of indulging in the illegal practice of torpedoing all merchant vessels at sight, which was the policy adopted by German warships of this class during the Great War. (Ibid. p. 54.)

State control of shipping.—Subsidies and other special measures have been resorted to by states desiring to control merchant shipping. These have developed according to the supposed interests of the states concerned. Sometimes mercantile interests, sometimes political plans,

and sometimes war exigencies have determined the attitude of states toward the mercantile marine. The World War dislocated the commerce of the world to such an extent that unusual measures were undertaken, and attempts to justify the measures sometimes strained the ordinary processes of international negotiation and led to action which made world conditions even more unstable.

Control of shipping by the United States.—By the act of June 15, 1917, the President of the United States was authorized:

> (*c*) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States, any ship now constructed or in process of construction or hereafter constructed, or any part thereof, or charter of such ship. (40 U. S. Stat., p. 182.)

This was an act "to supply urgent deficiencies in appropriations for Military and Naval Establishments on account of war expenses."

The act also provides:

> The word "ship" shall include any boat, vessel, or submarine and the parts thereof.

The same act made provision for the operation of ships thus acquired by agencies other than the Army and Navy Departments. Ships were taken over by the President under this authorization and at times the United States represented by the United States Shipping Board became "the possessor" of the vessel.

Certificate of requisition.—The documentary evidence is shown in the certificate of requisition.[1]

Charters.—Requisition charters made provision for compensation and for the operation of these vessels under time charters if they were taken over by the Shipping Board or under certain other conditions for operation under the bare-boat form.

The Shipping Board.—The United States Shipping Board, instituted in 1916 to build up a merchant marine

See footnote on page 46.

1

THE

RADIO CALL | LETTERS

UNITED STATES OF AMERICA

DEPARTMENT OF COMMERCE

BUREAU OF NAVIGATION

Certificate of Requisition

In Pursuance of the following Proclamation of the President of the United States, promulgated March 20, 1918.

By the President of the United States of America:

A PROCLAMATION.

Whereas, the law and practice of nations accords to a belligerent power the right in times of military exigency and for purposes essential to the prosecution of war, to take over and utilize neutral vessels lying within its jurisdiction;

Place for Seal of Department of Commerce

And whereas the act of Congress of June 15, 1917, entitled "An act making appropriations to supply urgent deficiencies in appropriations for the Military and Naval Establishments on account of war expenses for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for the other purposes," confers upon the President power to take over the possession of any vessel within the jurisdiction of the United States for use or operation by the United States:

Now therefore, I, Woodrow Wilson, President of the United States of America, in accordance with international law and practice and by virtue of the act of Congress aforesaid, and as Commander in Chief of the Army and Navy of the United States, do hereby find and proclaim that the imperative military needs of the United States require the immediate utilization of vessels of Netherlands registry, now lying within the territorial waters of the United States; and I do therefore authorize and empower the Secretary of the Navy to take over on behalf of the United States the possession of and to employ all such vessels of Netherlands registry as may be necessary for essential purposes connected with the prosecution of the war against the Imperial German Government. The vessels shall be manned, equipped, and operated by the Navy Department and the United States Shipping Board, as may be deemed expedient; and the United States Shipping Board shall make to the owners thereof full compensation, in accordance with the principles of international law.

In testimony whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done in the District of Columbia, this twentieth day of March, in the year of our Lord one thousand nine hundred and eighteen, and of the Independence of the United States of America the one hundred and forty-second.

WOODROW WILSON.

By the President:

ROBERT LANSING, *Secretary of State.*

Communications of Navigation.

.....

has taken and subscribed the required oath, and has sworn that the United States of America represented by the United States Shipping Board is the only possessor of the vessel called the ....., *of* .....

whereof ..... *is at present master, and is a citizen of the United States, and that the said vessel was built in the year* 1....., *at* ..... *of* .....

as appears by .....

..... *and* .....

has certified that the said vessel is a ..... *deck*....., *mast, a* ..... *head, and a* ..... *stern; that her register length is* ..... *feet, her register breadth* ..... *feet, her register depth* ..... *feet, her height* ..... *feet; that she measures as follows:*

	TONS	100THS
Capacity under tonnage deck		
Capacity between decks above tonnage deck		
Capacity of inclosures on the upper deck, viz.: Forecastle ..... ; bridge ..... ; poop ..... ; break ..... ; houses—round ..... , side ..... , chart ..... , radio ..... ; excess hatchways ..... ; light and air		
GROSS TONNAGE		
Deductions under Section 4153, Revised Statutes, as amended:		
Crew space ..... ; Master's cabin ..... ; Steering gear ..... ; Anchor gear ..... ; Boatswain's stores ..... ; Chart house ..... ; Donkey engine and boiler ..... ; Radiohouse ..... ; Storage of sails ..... ; Propelling power (actual space .....)		
Total Deductions		
NET TONNAGE		

The following-described spaces, and no others, have been omitted, viz.: Forepeak used for water-ballast ....., *aftpeak used for water-ballast* ....., *open forecastle* ....., *open bridge* ....., *open poop* ....., *open shelter-deck* ....., *anchor gear* ....., *steering gear* ....., *donkey engine and boiler* ....., *light and air* ....., *wheelhouse* ....., *galley* ....., *condenser* ....., *water-closets* ....., *cabins* .....

the said ..... *has agreed to the description and admeasurement above specified.*

GIVEN under my hand and seal, at the Port of ....., *this* ..... *day of* ....., *in the year one thousand nine hundred and* .....

Place for Seal of Naval Officer.

..... *Naval Officer.*

Place for Seal of Collector.

..... *Collector of Customs.*

to meet American needs on the outbreak of war, became an agency for organizing the shipping to promote the ends of the war. As Prof. J. R. Smith, in The Influence of War on Shipping, says: "The official mind replaces supply and demand." Ships were allocated as to routes and employment. The taking over was on the outbreak of war for war purposes and the ships were run for war ends.

Ships on time charter.—While the time charter provides that a vessel operated by the owner for the United States is not a public ship but shall be subject to the laws governing merchant ships, this provision relates to domestic rules and might be acceptable to neutrals. This provision would not determine the attitude of a belligerent toward a vessel requisitioned by the United States and under a time charter, the first provision of which is that "the steamship shall remain in the service of the United States." The United States Shipping Board had large grants from the Public Treasury for the maintenance of these ships.

Subsidies, bounties, subventions, in one and another form, have been common and have placed vessels under obligation to the government with a possibility of control. It had been generally maintained that until the control had been assumed the vessel would be regarded as a private vessel, unless there was evidence to the contrary other than the existence of a subsidy in time of peace.

Neutral attitude.—A neutral state is not concerned with the public or private ownership of merchant vessels flying merchant flags of a belligerent state. It is, however, responsible for the treatment which it accords to vessels which are adapted to carry on hostilities.

Belligerent attitude.—The belligerents are concerned both as to ownership and as to character of vessels. If a vessel is a public vessel of an enemy and armed it may be attacked without warning because it would be within the category of vessels of war. If it is an unarmed public vessel (not of an exempt class, such as hospital ships),

it may likewise be attacked without warning if it is engaged in military operations as scouting, etc. The belligerent must for his own safety know whether a vessel of any nationality is concerned in the war.

Shipping Board vessels.—There has been much discussion as to the status of vessels of the United States Shipping Board during war. This question was discussed in the opinion of the United States and German Mixed Claims Commission in 1924. (Decisions and Opinions, p. 75; see also 1923 N. W. C., International Law Decisions, p. 189.)

The Shipping Board was established in pursuance of the act of the Congress of the United States of September 7, 1916 (39 Statutes at Large, 728), entitled "An act to establish a United States Shipping Board for the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its Territories and possessions and with foreign countries; to regulate carriers by water engaged in the foreign and interstate commerce of the United States, and for other purposes." The act as amended provided that the members of the board should be appointed by the President subject to confirmation by the Senate; that they should be selected with due regard for the efficient discharge of the duties imposed on them by the act; that two should be appointed from States touching the Pacific Ocean, two from States touching the Atlantic Ocean, one from States touching the Gulf of Mexico, one from States touching the Great Lakes, and one from the interior, but that not more than one should be appointed from the same State and not more than four from the same political party. All employees of the board were selected from lists supplied by the Civil Service Commission and in accordance with the civil service law. The board was authorized to have constructed and equipped, as well as "to purchase, lease, or charter, vessels *suitable, as far as the commercial requirements of the marine trade of the United States may permit*, for use as naval auxiliaries or Army transports, or for other naval or military purposes." * * * The board was authorized to create a corporation with a capital stock of not to exceed $50,000,000 "for the purchase, construction, equipment, lease, charter, maintenance, and operation *of merchant vessels in the commerce of the United States.*" In pursuance of this latter provision the United States Shipping Board Emer-

gency Fleet Corporation (sometimes hereinafter referred to as Fleet Corporation) was organized under the laws of the District of Columbia with a capital stock of $50,000,000, all fully paid and all held and owned by the United States save the qualifying shares of the trustees. Under the terms of the act, this corporation could not engage in the *operation* of vessels owned or controlled by it unless the board should be unable to contract with citizens of the United States for the purchase or operation thereof. * * * The act taken in its entirety indicates that the controlling purpose of the Congress was to promote the development of an American merchant marine and also "*as far as the commercial requirements of the marine trade of the United States may permit*" provide vessels susceptible of "use as naval auxiliaries or Army transports, or for other naval or military purposes." * * *

Following America's entrance into the war on April 6, 1917, Congress through the enactment of several statutes clothed the President of the United States with broad powers, including the taking over of title or possession by purchase or requisition of constructed vessels or parts thereof or charters therein and the operation, management, and disposition of such vessels and all other vessels theretofore or thereafter acquired by the United States. * * * Under the requisition charter it was expressly stipulated that the vessel "*shall not have the status of a public ship*, and shall be subject to all laws and regulations *governing merchant vessels* * * *. When, however, the requisitioned vessel is *engaged in the service of the War or Navy Department, the vessel shall have the status of a public ship*, and * * * the masters, officers, and crew shall become the immediate employees and agents of the United States, with all the rights and duties of such, the vessel passing completely into the possession and the master, officers, and crew absolutely under the control of the United States." At another point in the requisition charter it was stipulated that the master "shall be the agent of the owner in all matters respecting the management, handling, and navigation of the vessel, *except when the vessel becomes a public ship*." * * *

Construing the shipping act, the Executive orders of the President, and the provisions of an operating agreement similar to that hereinbefore described, the Supreme Court of the United States held a vessel *owned* by the Fleet Corporation but operated by an American national as an agent of the Shipping Board was a merchant vessel and subject to libel in admiralty for the consequences of a collision. It is apparent that a vessel either owned or requisitioned by the Shippnig Board or Fleet Corporation and operated by an agent of the United States under such an operating or man-

aging agreement as hereinbefore described was a merchantman and in no sense impressed with a military character.

The Mixed Commission's opinion was that the simple arming and manning by a gun crew would not convert a merchant vessel into "naval and military works or materials" as that phrase was used in the treaty of Versailles, but this opinion was not aimed at determining the status of such vessels in other respects. Indeed in this same opinion, in considering the case of the steamship *John G. McCullough*, requisitioned by the Shipping Board and turned over to the War Department and operated under its orders, it was said:

> She possessed every indicia of a military character save that she was not licensed to be engaged in *offensive* warfare against enemy ships. Offensive operations on the seas was not her function. The fact that the legal title to her had not vested in the United States is wholly immaterial. She was in the possession of the United States. It had the right against all the world to hold, use, and operate her and was in fact operating her through its War Department by a master and crew employed by and subject in every respect to the orders of the War Department. She was actively performing a service for the Army on the fighting front. She possessed none of the indicia of a merchant vessel. The very requisition charter under which she was operating took pains to declare her a "public ship" and not a merchant vessel subject to the laws, regulations, and liabilities as such as was the *Lake Monroe*. She was at the time of her destruction being utilized for "other * * * military purposes" within the meaning of that phrase as used in section 5 of the shipping act. She was impressed with a military character.

In the technical sense such a vessel had practically been converted into a vessel which would be in the category of a public ship impressed with a military character.

In the case of *Berizzi Bros. Co.* v. *Steamship Pesaro*, decided by the United States Supreme Court in 1926, referring to the case of *Schooner Exchange* (7 Cranch 116), it was said:

> It will be perceived that the opinion, although dealing comprehensively with the general subject, contains no reference to merchant ships owned and operated by a government. But the omis-

sion is not of special significance, for in 1812, when the decision was given, merchant ships were operated only by private owners and there was little thought of governments engaging in such operations. That came much later.

The decision in *The Exchange*, therefore, can not be taken as excluding merchant ships held and used by a government from the principles there announced. On the contrary, if such ships come within those principles, they must be held to have the same immunity as warships, in the absence of a treaty or statute of the United States evincing a different purpose. No such treaty or statute has been brought to our attention.

We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans, and operates ships in the carrying trade they are public ships in the same sense that warships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force. (271 U. S. 562.)

Treatment of vessels.—The classes of public merchant vessels, armed and unarmed, are comparatively new. The treatment of belligerent vessels would logically rest on the criterion, Are the vessels combatant or noncombatant? A belligerent can not legally demand that the personnel on a combatant vessel be spared. A belligerent may demand that the personnel on a noncombatant vessel be placed in safety. The question as to whether the title to a vessel is in a private, in a quasi private person of enemy nationality, or in the enemy state itself is a matter of minor importance, particularly since the national control of shipping in belligerent countries is probable in future wars. If, however, the principle of exemption of private property at sea from capture should be adopted, the question of title might become important.

Sir Frederick Smith in March, 1917, wrote:

Vessels belonging to the enemy state, and notably warships, may be attacked, captured, or destroyed by a belligerent man-of-war anywhere on the high seas or in the territorial waters of the contending belligerents, at any time and without notice. But

enemy merchantmen are not to be subjected to such summary and drastic treatment.

There are several reasons for such differentiation. In the first place, enemy merchantmen are not combatants. International law and practice have long recognized a line of demarcation between combatants and noncombatants both in war on land and in war on sea. (The Destruction of Merchant Ships under International Law, p. 15.)

Manifestly the sinking without notice of vessels unarmed and engaged in purely mercantile pursuits, even though the property of an enemy state, might bring no commensurate military advantage. If all publicly owned vessels were liable, the United States Shipping Board vessels could probably be sunk without notice. Transfer to private ownership after outbreak of war would doubtless be held invalid. Many questions would arise as to vessels partly public owned or subsidized.

Ground of suspicion.—The Elve and *The Bernisse* were two Dutch steamships engaged in carrying groundnuts from Senegal to Rotterdam, a transport approved by the French Government, and each consignment was accompanied by a sort of permit issued by the French colonial authorities. These vessels were stopped by a British cruiser off the Orkney Islands on May 20, 1917, and were ordered to go to Kirkwall, and on each a prize crew of an officer and three men was put to see that the order was carried out. The reason given was that the vessels did not have a British permit and that the cargo was in bulk and that "it would have been impossible to examine the ships at sea in order to find out whether there was anything hidden under the cargo."

At the time of the sending in of these Dutch steamships the Order in Council of February 16, 1917, was in effect:

1. A vessel which is encountered at sea on her way to or from a port in any neutral country affording means of access to the enemy territory without calling at a port in British or allied territory shall, until the contrary is established, be deemed to be carrying goods with an enemy destination, or of enemy origin, and shall be brought in for examination, and, if necessary, for adjudication before the prize court.

2. Any vessel carrying goods with an enemy destination, or of enemy origin, shall be liable to capture and condemnation in respect of the carriage of such goods: *Provided*, That in the case of any vessel which calls at an appointed British or allied port for the examination of her cargo, no sentence of condemnation shall be pronounced in respect only of the carriage of goods of enemy origin or destination, and no such presumption as is laid down in article 1 shall arise.

3. Goods which are found on the examination of any vessel to be goods of enemy origin or of enemy destination shall be liable to condemnation.

4. Nothing in this order shall be deemed to affect the liability of any vessel or goods to capture or condemnation independently of this order. (3 Grant, Br. and Col. Prize Cases, p. 771.)

While the vessels were en route to Kirkwall *The Elve* was sunk by a German submarine and *The Bernisse* was badly damaged.

In 1920 the judicial committee of the Privy Council, to which the case had come on appeal from a judgment against the Crown, said:

As there was in this case no ground whatever proved on which either ships or cargo could have been condemned as prize, any more than any ground for detaining them under the Order in Council, the question remaining is merely that of reasonable ground for the action taken. To show such ground the Crown rely on two points: First, they say that the detention was a legitimate exercise of the right of search. In this war it has been agreed that search at sea has been practically impossible, and sending into port for search has been almost universal. In this case, further, there was evidence that the search at sea for contraband hidden under the groundnuts would have been impossible. The President, however, has disposed of this point by saying that even if the officers might have suspected that something contraband was hidden under the groundnuts; in fact, they did not do so, and have never said that they did. They really only sent the vessels in because there was no green clearance. This seems a sufficient answer, and it is unnecessary to go further, but counsel for the respondents do further argue that ever for a search reasonable ground for suspicion must be shown, and that where everything is in order on the papers, and there is no circumstance suggesting hidden contraband, even a search on the spot would be unjustifiable. In strictness this is, of course, correct; but so little suspicion is required to justify a search that

their lordships are not prepared to say that if a boarding officer were to state that, finding the cargo to be in bulk, he thought that something might be hidden under it, and therefore directed a search, his conduct would be so unreasonable as to subject the Crown to a liability for damages. (Ibid.)

In referring to the case of the *Ostsee*, which arose in the Crimean War, the judicial committee said:

It was there held that to exempt captors from costs and damages there must be some circumstances connected with the ship or cargo affording reasonable ground for belief that the ship or cargo might prove a lawful prize. (Ibid.)

In referring later to this case, approval was given to the headnote, "That an honest mistake occasioned by an act of government will not relieve captors from liability to compensate a neutral."

From this deliberate decision of the highest British judicial authority it is evident that "a reasonable ground for suspicion must be shown" to render a vessel liable to search, though just what such ground might be is not decided.

Bringing in of prize.—Early instructions in regard to bringing in of prize are reviewed in Situation III of Naval War College International Law Situations of 1908, pages 68 to 70.

The Institut de Droit International at the Oxford session in 1913 formulated the following:

ART. 102. Le navire saisi doit être conduit dans un port de l'Etat capteur ou dans celue d'une puissance belligérante ailliée, aussi proche que possible, susceptible d'offrir un abri sûr et ayant des communications faciles avec le tribunal des prises chargé de statuer sûr la capture. Pendant le voyage la prise naviguera avec le pavillon et la flamme, insigne des navires militaries de l'Etat.

The Instructions issued to the Navy of the United States in 1917 prescribed in section 80 that—

80. Except under extraordinary circumstances, prizes shall be sent promptly to a port within the jurisdiction of the United States for adjudication. In general, a prize master with a crew shall be sent on board the prize for this purpose. If for any

reason this is impracticable, a prize may be escorted into port by the capturing vessel or by another vessel of war of the United States or of an ally. In this exceptional case the prize shall be directed to lower her flag and to steer according to the orders of the escorting vessel of war. The prize must obey the instructions of the escorting vessel, under pain of forcible measures.

Other regulations provide for escort of prize to port of adjudication. In early cases before prize courts, the intention of taking the prize had to be proven. The animus capiendi must be supported by fact. The master of a merchant vessel may be requested to navigate his vessel in accordance with certain directions, but the master is under no obligations to navigate in such manner. The consequences of refusal depend upon the adequacy of the force of the captor and failure to follow instructions may result in the consequences that follow resistance to capture.

While there may be problems arising from bringing vessels into port for prize proceedings and from bringing vessels into port for search, in both cases the responsibilty rests upon the flag of the state bringing the vessel in, but the wrongful bringing in or detention may give ground for compensation. Whether certificates, "letters of assurance," "navicerts," or other documentation at the port of shipment will be accepted as proof of innocence in the future, when such proficiency in evading supervision outside neutral jurisdiction has been developed, as has been shown off the coast of the United States in circumventing regulations relating to liquor traffic, is open to question. The wit of man in evading man-made law has usually shown a development commensurate with that of the law, and there is always the possibility among states that undue interference may provoke effective retaliation. This may be specially potent in commercial relations in time of war.

When a merchant vessel is under the actual control of a vessel of war of a belligerent, there is no question as to the responsibility and liability, whether or not the bel-

ligerent vessel has acted in a strictly legal manner. If there is a reasonable ground for taking a vessel into port, it is usually admitted that there is no liability except to use reasonable care in navigation. In the case of *The Elve and The Bernisse* before the British courts. it was argued "that ever for a search reasonable ground for suspicion must be shown, and that where everything is in order on the papers, and there is no circumstance suggesting hidden contraband, even a search on the spot would be unjustifiable" (3 Grant, Br. and Col. Prize Cases, p. 777), and the judicial committee of the Privy Council admitted that "in strictness this is, of course, correct; but so little suspicion is required to justify a search that their lordships are not prepared to say that if a boarding officer were to state that, finding the cargo to be in bulk, he thought that something might be hidden under it and therefore directed a search, his conduct would be so unreasonable as to subject the Crown to a liability for damages." (Ibid.)

British practice, 1914–1915.—At the outbreak of the World War in 1914, it was expected that the laws of war previously recognized would be observed by the belligerents. Of this a paper presented to the British Parliament in January, 1916, said:

1. The object of this memorandum is to give an account of the manner in which the sea power of the British Empire has been used during the present war for the purpose of intercepting Germany's imports and exports.

I.—BELLIGERENT RIGHTS AT SEA

2. The means by which a belligerent who possesses a fleet has, up to the time of the present war, interfered with the commerce of his enemy are three in number:

(*i*) The capture of contraband of war on neutral ships.

(*ii*) The capture of enemy property at sea.

(*iii*) A blockade by which all access to the coast of the enemy is cut off.

3. The second of these powers has been cut down since the Napoleonic wars by the Declaration of Paris of 1856, under which enemy goods on a neutral ship, with the exception of contraband

of war, were exempted from capture. Enemy goods which had been loaded on British or allied ships before the present war were seized in large quantities immediately after its outbreak; but for obvious reasons such shipments ceased, for all practical purposes, after August 4, 1914, and this particular method of injuring the enemy may, therefore, for the moment be disregarded.

No blockade of Germany was declared until March, 1915, and, therefore, up to that date we had to rely exclusively on the right to capture contraband.

II.—CONTRABAND

4. By the established classification goods are divided into three classes:

(*a*) Goods primarily used for war-like purposes.

(*b*) Goods which may be equally used for either war-like or peaceful purposes.

(*c*) Goods which are exclusively used for peaceful purposes.

5. Under the law of contraband, goods in the first class may be seized if they can be proved to be going to the enemy country; goods in the second class may be seized if they can be proved to be going to the enemy government or its armed forces; goods in the third class must be allowed to pass free. As to the articles which fall within any particular one of these classes, there has been no general agreement in the past, and the attempts of belligerents to enlarge the first class at the expense of the second and the second at the expense of the third have led to considerable friction with neutrals.

6. Under the rules of prize law, as laid down and administered by Lord Stowell, goods were not regarded as destined for an enemy country unless they were to be discharged in a port in that country; but the American prize courts in the Civil War found themselves compelled by the then existing conditions of commerce to apply and develop the doctrine of continuous voyage, under which goods which could be proved to be ultimately intended for an enemy country were not exempted from seizure on the ground that they were first to be discharged in an intervening neutral port. This doctrine, although hotly contested by many publicists, had never been challenged by the British Government, and was more or less recognized as having become part of international law.

7. When the present war broke out it was thought convenient, in order, among other things, to secure uniformity of procedure among all the allied forces, to declare the principles of international law which the allied Governments regarded as applicable

to contraband and other matters. Accordingly, by the Orders in Council of August 20 and October 22, 1914, and the corresponding French decrees, the rules set forth in the Declaration of London were adopted by the French and British Governments with certain modifications. As to contraband, the lists of contraband and free goods in the declaration were rejected, and the doctrine of continuous voyage was applied not only to absolute contraband, as the declaration already provided, but also to conditional contraband, if such goods were consigned to order, or if the papers did not show the consignee of the goods, or if they showed a consignee in enemy territory.

8. The situation as regards German trade was as follows: Direct trade to German ports (save across the Baltic) had almost entirely ceased, and practically no ships were met with bound to German ports. The supplies that Germany desired to import from overseas were directed to neutral ports in Scandinavia, Holland, or (at first) Italy, and every effort was made to disguise their real destination. The power which we had to deal with this situation in the circumstances then existing was—

(*i*) We had the right to seize articles of absolute contraband if it could be proved that they were destined for the enemy country, although they were to be discharged in a neutral port.

(*ii*) We had the right to seize articles of conditional contraband if it could be proved that they were destined for the enemy Government or its armed forces, in the cases specified above, although they were to be discharged in a neutral port.

9. On the other hand, there was no power to seize articles of conditional contraband if they could not be shown to be destined for the enemy Government or its armed forces, or noncontraband articles, even if they were on their way to a port in Germany, and there was no power to stop German exports.

10. That was the situation until the actions of the German Government led to the adoption of more extended powers of intercepting German commerce in March, 1915. The allied Governments then decided to stop all goods which could be proved to be going to or coming from Germany. The state of things produced is in effect a blockade, adapted to the condition of modern war and commerce, the only difference in operation being that the goods seized are not necessarily confiscated. In these circumstances it will be convenient, in considering the treatment of German imports and exports, to omit any further reference to the nature of the commodities in question as, once their destination or origin is established, the power to stop them is complete. Our contraband rights, however, remain unaffected, though they, too, depend on the ability to prove enemy destination. (Statement

of the Measures Adopted to Intercept the Seaborne Commerce of Germany. British Parliamentary Papers, Misc., No. 2 (1916), p. 1.)

Restriction of commerce by reprisals.—While reprisals are aimed against an enemy, the belligerents in the World War did not hesitate to resort to measures which directly affected neutrals. So long as neutrals tolerated such action or merely wrote notes which could be answered somewhat at leisure by the belligerents, reprisals naturally extended so as to interfere more and more with what were previously regarded as neutral rights.

The British Order in Council of March 11, 1915, purporting to be replying to the German proclamation declaring the waters surrounding the United Kingdom a military area, in reprisal stated that His Majesty had "therefore decided to adopt further measures to prevent commodities of any kind from reaching or leaving Germany." This Order in Council was published in the London Gazette of March 15, 1915, and transmitted in a letter of the same date by the American ambassador to the Secretary of State. In a note of March 30 the American Secretary of State mentions this Order in Council as containing "matters of grave importance to neutral nations. They appear to menace their rights to trade and intercourse not only with belligerents but also with one another." * * *

The Order in Council of the 15th of March would constitute, were its provisions to be actually carried into effect as they stand, a practical assertion of unlimited belligerent rights over neutral commerce within the whole European area, and an almost unqualified denial of the sovereign rights of the nations now at peace.

This Government takes it for granted that there can be no question what those rights are. A nation's sovereignty over its own ships and citizens under its own flag on the high seas in time of peace is, of course, unlimited; and that sovereignty suffers no diminution in time of war, except in so far as the practice and consent of civilized nations has limited it by the recognition of certain now clearly determined rights, which it is conceded may be exercised by nations which are at war.

A belligerent nation has been conceded the right of visit and search, and the right of capture and condemnation, if upon examination a neutral vessel is found to be engaged in unneutral service or to be carrying contraband of war intended for the enemy's government or armed forces. It has been conceded the right to establish and maintain a blockade of an enemy's ports and coasts and to capture and condemn any vessel taken in trying to break the blockade. It is even conceded the right to detain and take to its own ports for judicial examination all vessels which it suspects for substantial reasons to be engaged in unneutral or contraband service and to condemn them if the suspicion is sustained. But such rights, long clearly defined both in doctrine and practice, have hitherto been held to be the only permissible exceptions to the principle of universal equality of sovereignty on the high seas as between belligerents and nations not engaged in war.

It is confidently assumed that His Majesty's Government will not deny that it is a rule sanctioned by general practice that, even though a blockade should exist and the doctrine of contraband as to unblockaded territory be rigidly enforced, innocent shipments may be freely transported to and from the United States through neutral countries to belligerent territory without being subject to the penalties of contraband traffic or breach of blockade, much less to detention, requisition, or confiscation.

Moreover the rules of the Declaration of Paris of 1856—among them that free ships make free goods—will hardly at this day be disputed by the signatories of that solemn agreement. (9 Amer. Jour. Int. Law, Spec. Sup., July, 1915, p. 117.)

Protests from neutral sources in regard to the operation of the exceptional measures provided for in the British retaliatory order led to an investigation and special report by a committee. This report was presented to Parliament in February, 1917. The committee as a result of its investigation says in part:

Neutral vessels are brought into British ports under the order in council of March 11, 1915, in order that the belligerent may be satisfied as to the character, ownership, destination, or origin of the cargo which they carry. Whether any delay caused by the methods employed in dealing with ships and cargoes so brought in is or is not avoidable must be determined by reference to the delay which is inseparable from the effective exercise of this right.

That its exercise must involve some delay is plain. This would be true even if the belligerent were to rely exclusively on the

older practice of search at sea. But we are satisfied upon the evidence that the maintenance of this practice is neither possible, in view of the increased size of ships, nor, in view of the conduct of enemy submarines, desirable in the interests of neutral lives and property.

Not only so, but to exercise the right solely by means of the older practice would be tantamount to a complete abandonment of the right itself. The documents carried on a ship no longer furnish conclusive, or necessarily even presumptive, evidence of the true character, ownership, or destination of the cargo. The great increase of facilities by which goods can be circuitously conveyed to or from an enemy country, and the existence of other and speedier means of communication between traders than the ship carrying the goods, afford almost infinite opportunity for concealment. The documents which would disclose the true nature of the transaction, the contracts, correspondence, and cables may pass independently. Unless, therefore, the neutral is provided with better credentials than the documents carried by the ship, the evidence of the real facts has to be sought for by the belligerent from sources outside the ship.

Some alteration, then, not of principle but of practice, became necessary, and the machinery for carrying into effect the order in council of March 11, 1915, is the modern equivalent of the older methods. In order to determine whether the delays resulting from the modern methods can be diminished or avoided, we have considered it our duty to investigate, point by point, the whole of this machinery and have examined witnesses from all the departments concerned.

2. METHODS EMPLOYED IN DEALING WITH SHIPS AND CARGOES UNDER THE ORDER IN COUNCIL, MARCH 11, 1915

(1) *Visit at sea.*—All ships intercepted by the patrolling squadrons are visited, the time occupied in so doing being about three hours, except in heavy weather, when delay occurs till the weather moderates sufficiently to permit of boarding. On a decision being taken to send the ship in, she is dispatched under an armed guard to the most convenient port, called a port of detention; in the case of ships going "north-about," for the most part to Kirkwall or Lerwick, but sometimes, if westward bound, to Stornoway, or very occasionally to Ardrossan. Ships going "south-about" are detained in the Downs or sent into Falmouth or Dartmouth.

(2) *Visit and search at the port of detention.*—On arrival at a port of detention the ship is visited by the customs officers, who examine the manifest, bills of lading, and any other relevant documents which she may be carrying, and prepare a detailed

analysis of her whole cargo. Ships detained in the Downs are visited and reported upon in the same way by the naval authorities. (British Parliamentary Papers, Misc., No. 6 (1917), p. 2.)

The committee seemed to find that the objections of neutrals proceeded from the nature of the order in council of March 11, 1915, rather "than to the machinery by which those provisions were enforced."

Instructions of the United States, 1917.—The Instructions for the Navy of the United States Governing Maritime Warfare, issued in 1917, were in accord with the generally understood requirements in regard to visit and search. Some of these requirements were based upon treaty stipulations:

44. Subject to any special treaty provisions, the following procedure is directed: Before summoning a vessel to lie to a ship of war must hoist her own national flag. The summons shall be made by firing a blank charge (coup de semonce), by other international signal, or by both. The summoned vessel, if a neutral, is bound to stop and lie to, and she should also display her colors; if an enemy vessel, she is not so bound, and may legally even resist by force, but she thereby assumes all risks of resulting damage.

45. If the summoned vessel resists or takes to flight, she may be pursued and brought to by forcible measures, if necessary.

46. When the summoned vessel has brought to, the ship of war shall send a boat with an officer to conduct the visit and search. If practicable, a second officer should accompany the officer charged with the examination. There may be arms in the boat, but the boat's crew shall not have any on their persons. The officer (or officers), wearing side arms, may be accompanied on board by not more than two unarmed men of the boat's crew.

47. The boarding officer shall first examine the ship's papers in order to ascertain her nationality, ports of departure and destination, character of cargo, and other facts deemed essential. If the papers furnish conclusive evidence of the innocent character of vessel, cargo, and voyage, the vessel shall be released; if they furnish probable cause for capture, she shall be seized and sent in for adjudication (p. 21).

Changes in practice, 1914–1918.—Among the many changes in practice during the World War was that of the introduction of extrinsic evidence in regard to lia-

bility of vessels to capture. In early cases it was understood that in a prize court the "property of the neutral claimant shall not be condemned except on evidence coming out of his own mouth or arising out of the clear circumstances of the transaction. If this rule is unsatisfactory to captors, it is nevertheless the rule which the law prescribes." (Sir William Scott, in *The Haabet* (1805), 6 C. Robinson, Admiralty Reports, p. 54.)

The British Prize Court Rules under which these prize courts later acted during the World War permitted the introduction of evidence from most diverse sources, some of it being inferential, from pre-war and postwar trade statistics. A note of the Department of State of the United States to the British Government, October 21, 1915, stated:

> The result is, as pointed out above, that innocent vessels or cargoes are now seized and detained on mere suspicion, while efforts are made to obtain evidence from extraneous sources to justify the detention and the commencement of prize proceedings, The effect of this new procedure is to subject traders to risk of loss, delay, and expense so great and so burdensome as practically to destroy much of the export trade of the United States to neutral countries of Europe.
>
> (10) In order to place the responsibility for the delays of vessels and cargoes upon American claimants, the Order in Council of October 29, 1914, as pointed out in the British note of February 10, seeks to place the burden of proof as to the noncontraband character of the goods upon the claimant in cases where the goods are consigned "to order" or the consignee is not named or the consignee is within enemy territory. Without admitting that the onus probandi can rightfully be made to rest upon the claimant in these cases, it is sufficient for the purposes of this note to point out that the three classes of cases indicated in the Order in Council of October 29 apply to only a few of the many seizures or detentions which have actually been made by British authorities.
>
> (11) The British contention that in the American Civil War the captor was allowed to establish enemy destination by "all the evidence at his disposal," citing the *Bermuda* case (3 Wallace, 515), is not borne out by the facts of that case. The case of the *Bermuda* was one of "further proof," a proceeding not to determine whether the vessel should be detained and placed in a

prize court, but whether the vessel, having been placed in prize court, should be restored or condemned. The same ruling was made in the case of the *Sir William Peel* (5 Wallace, 517). These cases, therefore, can not be properly cited as supporting the course of a British captor in taking a vessel into port, there to obtain extrinsic evidence to justify him in detaining the vessel for prize proceedings. (10 Amer. Jour. Int. law, 1916 Sup. p. 77.)

This naturally led to an attempt to shift the burden of proof of innocence to the ship seized rather than to place upon the captor the burden of proof of guilt of the vessel captured. This and other changes, some of which might be reasonable, were made possible in 1914–1918 because of the weakness of some neutrals and the complaisance of others.

Defense and offense.—From the general nature of instructions given or supposed to have been given, it would seem that armed merchant vessels of belligerents were at liberty to fire upon enemy submarines without waiting for any firing by the submarine. The right of resistance has long been admitted and many argue that the most effective resistance is "a defensive attack." The difference between "a defensive attack" and "an offensive attack" seems to be in the intention of the officer ordering the attack. Intention is not easy to prove, even in time of peace, and in time of war may be even more difficult. Article 22 of the London naval treaty requires submarines to conform to the rules of international law to which surface vessels of war are subject in their action with regard to merchant ships as to sinking or rendering the merchant vessel incapable of navigation. The merchant vessel may be subject to the use of force in case of persistent refusal to stop after summons or of active resistance to visit and search. The pointing of a gun on a vessel flying a belligerent flag at a vessel of war of an enemy would under the ordinary regulations not merely constitute active resistance but constructive attack which it would be the duty of the commander of the submarine to anticipate by his own fire.

SOLUTION

(*a*) Under the conditions the action of submarine *No. 5* in summoning the *Star* to lie to is legal and submarine *No. 5* may, in case of persistent refusal, use force as would a surface vessel. The action of submarine *No. 6* in sinking the *Star* is illegal because not in accord with article 22 of the London naval treaty.

(*b*) The submarine of state X would be justified in firing upon an enemy merchant vessel whose decks have been strengthened for mounting 6-inch guns when the guns are mounted and pointed at the submarine.

(*c*) A submarine may order a merchant vessel to accompany it to port under penalty of being sunk.

SITUATION II

ABSENCE OF LOCAL AUTHORITY

In state A, owing to uprisings in ports O and P, the local authorities are unable to maintain order. A vessel of war of the United States, the *Naso*, is in port O and a companion vessel, the *Paxto*, is in port P. No other vessels of war are in ports of state A.

(*a*) In port O the crew of a merchant vessel of state A, the *Moon*, engages in a dispute with the crew of a merchant vessel of state B, the *Sun*. Shots are exchanged by the crews. The master of the *Moon* requests the aid of the *Naso*.

(*b*) Later the *Paxto*, in leaving port P, runs aground and local tugs refuse to aid in pulling the vessel off unless paid in advance for the service.

(*c*) Three members of the crew of the *Comet*, a vessel belonging to the United States Shipping Board and chartered to a private company, desert in port O. The master of the *Comet* requests that marines from the *Naso* may be detailed to apprehend the deserters.

(*d*) Mr. B, a citizen of the United States doing an import business in port O, is refused entrance for one of his vessels, the *Western*, on the ground that port O, owing to disturbed conditions, is closed. There is no force before port O. Mr. B has previously signed an agreement with the authorities of state A that he will not appeal to the United States for protection. He appeals to the commander of the *Naso*.

What should be done in each case? Why?

SOLUTION

(*a*) The *Naso*, under the situation as stated, where the local authorities are unable to maintain order owing to uprisings in the port—

(1) May not interfere in any partisan manner in a struggle, but may protect nationals of the United States and their property.

(2) When the *Naso* is the sole representative of responsible authority, if the struggle is not political, it may act to preserve life.

(3) The action should be confined to the measures essential to that end. This may involve the threat to use force or even the use of force.

(*b*) Pay for the salvage service in advance and require by force, if necessary, the rendering of the service for which payment is made.

(*c*) Inform the master of the *Comet* that under the act of March 4, 1915, no marines may be detailed to apprehend the deserters.

(*d*) Escort the *Western* into port, guarding against the furnishing of aid to either party in state A. The agreement of Mr. B with the authorities of state A has no effect.

NOTES

(*a*) *Order in port.*

Order in port.—The ports of a state are under the jurisdiction of that state. The state has in the port both rights and duties. It is generally admitted that a state has complete jurisdiction over its own merchant vessels in its ports and over foreign vessels for matters other than those relating to the internal economy of the vessel. The maximum amount of freedom consistent with the well-being of the port is usually accorded to vessels of war and other public vessels of a foreign state.

It is often argued that as man existed before the state the right of self-preservation of the individual takes precedence over any state right on the ground that an individual would not transfer to the state a right which might involve his own existence. When, however, the right to declare war is intrusted to the state, many rights of the individuals are subordinated and even, in case of need, his right to exist in personal safety when the well-

being of his state is threatened. The unity embodied in the state may from a broad point of view be more valuable to humanity than the individual or individuals who may be sacrificed to maintain it. Even extremists admit in fact that the law of humanity may sometimes take precedence over other law. It is, however, not always easy to determine what is meant by the law of humanity. Some writers reason that order is essential both to the existence of the state and of humanity. Each state would for itself determine the degree and type of order which should prevail within its limits. Some writers maintain that since there is no constituted collective world authority each state has the right to punish or to prevent violations of the right of humanity. (Grotius lib. ii, ch. xx, p. 40.) When there is no standard by which the rights of humanity can be measured, the operation of such a doctrine might lead to many arbitrary acts on the part of states having differing views as to the right of humanity. The concepts of the right of humanity, however, vary greatly among the civilizations of the earth. This is evident when the grounds advanced as justifying intervention by one state in affairs of another state are concerned.

The right to life has always been regarded as fundamental and one that should be assured by all possible means in time of peace. When security involving risk of life is at stake in the interior of a state, a foreign state would not ordinarily be in any position to act other than by bringing the matter to the attention of the state within whose jurisdiction the situation has arisen. This method of procedure has often been followed in case of protests against racial and antiforeign uprisings.

The maintenance of order in a port by the state within whose jurisdiction the port may be is presumed. Obedience to port authorities is similarly presumed to be obligatory. Entrance of a foreign vessel of war to a port is not regarded as exceptional or requiring special explana-

tion, though ordinarily notification of the proposed visit is given. The world at large is interested in the maintenance of order and each state should make such efforts to that end as may be possible without interfering with the rights of other states.

Necessity.—Early writers on international law found the grounds for many acts in the doctrine of necessity. Grotius and writers upon natural law often referred to necessity. Bartolus and Machiavelli sometimes seemed to bring the doctrine of necessity close to that of expediency. Self-defense has usually been acknowledged as a basis upon which a plea of necessity could rest. In the examination of the doctrine of necessity, it is customary to distinguish military necessity or necessity in time of war from other necessity. The use of exceptional means in defense of an unquestioned right is to be distinguished from the use of the same means in defence of an act which is not based upon an accepted right. An exceptional act under exceptional circumstances may not need the same grounds for its support as would an act based on necessity and in disregard of law.

In acting under the plea of necessity and in disregard of international law the necessity must be "instant, overwhelming, and leaving no choice of means and no moment for deliberation" and the measures taken must be kept clearly within the need.

The saying "necessity knows no law" is much more easy to cite than to sustain. It is, however, considered that in circumstances where there is no law or where law is not operating or where it can not operate, one who has power may be under obligation to use it wisely.

Protection and aliens.—Aliens may be called upon in emergency to aid in maintaining order or averting disaster. This has been generally admitted when savage natives have threatened attack upon a town or when fire is spreading. The basis of such a call is nonpolitical and communal security.

In 1888 Mr. Bayard, Secretary of State, in a note to the American minister to the Netherlands said:

It is well settled by international law that foreigners temporarily resident in a country can not be compelled to enter into its permanent military service. It is true that in times of social disturbance or of invasion their services in police or home guards may be exacted, and that they may be required to take up arms to help in the defense of their place of residence against the invasion of savages, pirates, etc., as a means of warding off some great public calamity by which all would suffer indiscriminately. The test in each case, as to whether a foreigner can properly be enrolled against his will, is that of necessity. Unless social order and immunity from attack by uncivilized tribes can not be secured except through the enrollment of such a force, a nation has no right to call upon foreigners for assistance against their will. (1888 U. S. For. Rel., vol. ii, p. 1325.)

Intervention.—Intervention by a state in the affairs of another state is now regarded as an act to which resort should be had only in rare instances. There is held to be no need for such action as was formerly common, as states are supposed to accept and apply fairly uniform standards of action. Even the doctrine of intervention on the grounds of humanity is now rarely advanced except as a cloak for aggression, which it is hoped the provisions of the covenant of the League of Nations and the practice thereunder may make wholly unnecessary. Prof. E. C. Stowell, who has given much attention to the subject of intervention, says:

The right of the sovereign state to act without interference within its own territory, even though it be no more than a presumption, is of such importance to the well-being of international society that the states in their wisdom, as evidenced in their practice, have been jealous of lightly admitting the plea of humanity as a justification for action against a sister state, and we find that intervention on this ground has been rather rigidly limited to specific cases, and conditioned in each of them upon the existence of a certain state of facts. (E. C. Stowell, International Law, p. 352.)

Some of the provisions of the seamen's act of March 14, 1915 (38 U. S. Stat., p. 1164), have been advocated as based on the desire to advance humanity.

Interposition of foreign forces.—Foreign forces have often interposed for the protection of their nationals. There have been occasions when foreign forces have acted to preserve order even when nationals have not been directly involved. In 1929 the Department of State of the United States issued the second edition of a pamphlet entitled "Right to Protect Citizens in Foreign Countries by Landing Forces." Cases are mentioned in which protection of nationals is not the object of the landing of the forces.

In February last the *Tuscarora*, Commander Belknap, then at the port of Honolulu, in conjunction with the *Portsmouth*, Commander Skerrett, at the earnest solicitation of the Government, was instrumental in aiding in the restoration of order in that city. On the 12th of that month, on the occasion of the election of a King, riotous proceedings occurred, and at the pressing request of the authorities, detachments were landed from those vessels the following day. Their commanding officers were prompt on the occasion to comply with the wishes of the Government to aid in restoring order and be in readiness to protect the interests of our own citizens should they be jeopardized. In scarcely more than 15 minutes after signal on the 13th of February, companies comprising 150 officers, bluejackets, and marines, including a Gatling gun from the *Portsmouth*, were landed and marched to the scene of action. It was only necessary for the battalion to approach for the rioters to disperse. The courthouse was occupied and sentries posted at other public buildings. No further disturbances followed, and the new King was inaugurated. On the 16th a part of the force was withdrawn, and on the 20th the remainder, the Government signifying that their presence was no longer needed. (Right to Protect Citizens in Foreign Countries by Landing Forces. Memorandum of the Solicitor for the Department of State, p. 67; see also Report of the Secretary of the Navy, 1874, p. 8.)

In 1876, when conditions were disturbed in Mexico, forces were also landed and the Secretary of State of the United States notified the Mexican minister as follows:

It is proper to inform you that this department was yesterday by telegraph apprised by the consul of the United States at Matamoros that General Gonzalez, the chief insurrectionary officer

there, had informed him of his intention to abandon that city in consequence of the approach of General Escobedo, who was then within 30 miles. The consul adds that as there were no civil authorities he had asked Commander Johnson to land a small force to protect the lives and property of foreigners, and that this had been done. This proceeding seems to have been so obviously necessary and proper under the circumstances that it is hoped the Mexican Government will not disapprove the act, especially as the force will be withdrawn as soon as the authority of that Government shall be restored. (Right to Protect Citizens in Foreign Countries by Landing Forces, p. 67.)

Instructions, 1891.—The landing of forces for maintenance of order in a disturbed area has occurred, particularly in American and Asiatic territories, as in the time of unsettled conditions in Chile in 1891. Secretary Tracy, in instructions to Rear Admiral Brown in 1891, laid down certain principles in time of disturbed conditions:

As a further and more explicit guide for your action, you are directed:

(1) To abstain from any proceedings which shall be in the nature of assistance to either party in the present disturbance, or from which sympathy with either party could be inferred.

(2) In reference to ships which have been declared outlawed by the Chilean Government, if such ships attempt to commit injuries or depredations upon the persons or property of Americans, you are authorized and directed to interfere in whatever way may be deemed necessary to prevent such acts; but you are not to interfere except for the protection of the lives or property of American citizens.

(3) Vessels or other property belonging to our citizens which may have been seized by the insurgents upon the high seas and for which no just settlement or compensation has been made are liable to forcible recovery; but the facts should be ascertained before proceeding to extreme measures and all effort made to avoid such measures.

(4) Should the bombardment of any place, by which the lives or property of Americans may be endangered, be attempted or threatened by such ships, you will, if and when your force is sufficient for the purpose, require them to refrain from bombarding the place until sufficient time has been allowed for placing American life and property in safety.

You will enforce this demand if it is refused; and if it is granted, proceed to give effect to the measures necessary for the security of such life or property.

5. In reference to the granting of asylum, your ships will not, of course, be made a refuge for criminals. In the case of persons other than criminals, they will afford shelter wherever it may be needed, to Americans first of all, and to others, including political refugees, as far as the claims of humanity may require and the service upon which you are engaged will permit.

The obligation to receive political refugees and to afford them an asylum is, in general, one of pure humanity. It should not be continued beyond the urgent necessities of the situation, and should in no case become the means whereby the plans of contending factions or their leaders are facilitated. You are not to invite or encourage such refugees to come on board your ship, but should they apply to you your action will be governed by consideration of humanity and the exigencies of the service upon which you are engaged. When, however, a political refugee has embarked, in the territory of a third power, on board an American ship as a passenger for purposes of innocent transit, and it appears upon the entry of such ship into the territorial waters that his life is in danger, it is your duty to extend to him an offer of asylum.

6. Referring to paragraph 18, p. 137 of the Navy Regulations of 1876, which is as follows:

"If any vessel shall be taken acting as a vessel of war or a privateer without having proper commission so to act, the officers and crew shall be considered as pirates and treated accordingly."

You are informed that this paragraph does not refer to vessels acting in the interests of insurgents and directing their hostilities solely against the state whose authority they have disputed. It is only when such vessels commit piratical acts that they are to be treated as pirates, and unless their acts are of such character or are directed against the persons or property of Americans you are not authorized to interfere with them.

7. In all cases where it becomes necessary to take forcible measures, force will only be used as a last resort, and then only to the extent which is necessary to effect the object in view. (House Exec. Doc., 1st sess. 52d Cong., 1891–92, vol. 34, 245.)

Protected zones.—In recent years when local authorities have been unable to maintain order, foreign forces have sometimes declared that within certain defined areas no fighting should take place. These areas have often

been termed "neutral zones," though war in the "legal sense" did not exist, but war in the "material sense" did exist.

In listing occasions on which American forces have been landed in foreign countries, the Department of State, in the pamphlet, Right to Protect Citizens in Foreign Countries by Landing Forces, says:

> In January, 1904, a revolution was going on in the Dominican Republic and the Navy Department had sent the U. S. S. *Detroit*, Commander A. C. Dillingham commanding, to Puerto Plata, on the north coast, to protect American lives and property. H. B. M. S. *Pallas*, C. Hope Robertson commanding, was also there for a similar purpose.
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> The Jiminez faction, with Eugenio Deschamps in local command, had possession of the city of Puerto Plata. Forces under General Cespedes, operating in behalf of the Morales provisional government, approached the place along the coastal plain from the east with the declared intention of attacking and taking it. It was unfortified, and the Deschamps troops intended to defend from the shelter of the dwelling and business houses.
>
> Commanders Dillingham and Robertson established a cordon of flags outside of and around the entire town, notifying Deschamps and Cespedes that no fighting would be permitted within that area.
>
> A few days later Cespedes commenced an attack, and Commander Dillingham placed his vessel in such a position that her fire could aid in preventing armed bodies entering the town. He also landed a guard which had instructions to prevent armed bodies crossing the line. The British ship seems to have been absent at this time, probably to get coal.
>
> The Deschamps forces sallied out to meet their enemies and fought them beyond the cordon of flags. Being defeated, they retreated within the cordon, throwing down their guns as they passed it, and the town was immediately surrendered to the Cespedes forces (p. 73).

Bluefields, 1910.—In 1910 during the period of disturbed conditions in Nicaragua the British as well as the American naval officials took action to protect both nationals and nonnationals and their property. The commander of the British naval force informed the leaders of both parties of the Nicaraguan forces ashore that he proposed to land an armed guard if necessary saying:

The majority of the houses in Greytown are owned by British subjects and some by the subjects of other foreign powers. It is impossible, therefore, to fight in the town of Greytown without seriously risking the lives and property of these foreign subjects. From its situation the whole of the attack and defense of the town can take place well clear of the houses and the victory to one side or the other there decided.

This being so, I must insist that no fighting whatever take place in the town of Greytown; and if any does take place there, I shall consider myself at liberty to land a strong armed party and guns to stop it, and the offending party will be absolutely held responsible for any loss of life or damage of property caused thereby.

The Secretary of State reports that in a telegram from the consul at Bluefields:

Mr. Moffat says that Commander Gilmer issued a proclamation to the generals of the commanding forces of Estrada and Madriz and commander of *Venus* declaring that, in furtherance of protecting lives and property of American citizens and noncombatants, foreigners, within town of Bluefields, it is demanded—

First. That there be no armed conflict in the city.

Second. That until a stable government is established only such armed force, not to exceed 100 men, will be allowed in Bluefields, necessary to police and preserve order.

Third. There being no armed men of revolutionary forces in Bluefields, no bombardment of city will be permitted, as it could result only in destruction of lives and property of Americans and other foreign citizens. (1910 U. S. For. Relations, p. 745.)

Later in the same year the commander of the U. S. S. *Paducah* notified the forces contending in the neighborhood of Bluefields, Nicaragua, that he would oppose any attack on that city. The President of Nicaragua, Doctor Madriz, protested to President Taft that his, and other acts of the officers of the United States could not "be reconciled with the principles of neutrality proclaimed by the law of nations." In replying the Secretary of State on June 19, 1910, said:

As to the statements made in the telegram of Doctor Madriz to the President, the Government of the United States took only the customary step of prohibiting bombardment or fighting by either faction within the unfortified and ungarrisoned commer-

cial city of Bluefields, thus protecting the preponderating American and other foreign interests, just as the British commander had done at Greytown, where there are large British interests. (1910 U. S. For. Rel., p. 753.)

President Taft in a reply to a communication from the President of Mexico on the same subject reaffirmed the statement of the Secretary of State. (Ibid. p. 754.)

The President of Honduras similarly reported, January 29, 1911, that "the orders of the commanders of the English and American naval vessels in Puerto Cortes to restrict Government troops to a neutral zone, separated from its bases, places the troops at a great disadvantage." (Idem 1911, p. 297.)

Protection of foreigners.—There have been many examples where, in case local authorities are temporarily unable to afford the usual protection to their own nationals and to nationals of other states, protection has been afforded or order has been maintained by some authority not directly involved. In fact, it may be argued that such protection would be more disinterested than that afforded to nationals. Snow's International Law prepared for this Naval War College says:

> The British Admiralty Regulations provide for cases of this kind in the following terms:
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> "Applications for the protection of subjects of foreign powers in amity with Her Majesty may be entertained in case none of their ships of war are present; the application should, however, be made through Her Majesty's minister or consul, and it should only be acceded to when the protection does not interfere with the public service nor with the orders under which the naval officer is acting."
>
> Though no regulation of this kind exists for the United States Navy, it can be considered as an established usage to extend similar protection under similar circumstances (p. 65).

In time of disturbed conditions, when local authorities were not able to maintain order, foreign states have often lent aid. Secretary of State Knox in 1912, writing in regard to sending naval vessels to Cuba, said to the American minister: "The vessels were sent solely to pro-

vide some place and means of safety and protection for Americans and other foreigners and for such moral effect as they might have." (1912 U. S. For. Rel., p. 261.) The Secretary distinctly disavowed any intention to intervene. In speaking before the Senate Committee on Foreign Relations the Secretary of State on May 24, 1911, said:

> Honduras has been the scene of seven bloody revolutions within the last 15 years. Within that time the United States has been compelled to intervene, in the interests of universal commerce and civilization, to close or to prevent sanguinary ruinous civil war within her borders. (Ibid. p. 584.)

In the same address the Secretary said:

> Whether rightfully or wrongfully, we are in the eyes of the world and because of the Monroe doctrine, held responsible for the order of Central America, and its proximity to the Canal Zone makes the preservation of peace in that neighborhood particularly necessary. (Ibid. p. 588.)

The Acting Secretary of State in 1912, writing to the Secretary of Navy, saying that the policy of the Department of State was one of nonintervention in Mexico, and that the commander of the U. S. S. *Des Moines* should maintain a strictly neutral attitude, added:

> It would be glad to have him report frequently upon the developments in the political situation and begs to say that it would also be glad to have him, after Americans and American interests have been adequately provided for, to afford such assistance and protection to foreigners and foreign interests as may be possible under the circumstances. (Ibid. p. 854.)

In 1912 in the harbor of Vera Cruz Commander C. F. Hughes, of the cruiser *Des Moines*, informed the German consul that "In case the city is bombarded, I shall afford the same protection to the above properties as I shall afford protection to property of American citizens." (Ibid. p. 864.) As a result the American consul wrote to the Secretary of State, November 27, 1912:

> The conduct of the American Government in its protection of the lives and property of foreigners and natives, and that of Com-

mander Hughes, of the *Des Moines*, in particular, is lauded, and expressions of gratitude and approval are heard on all sides. (Ibid. p. 870.)

Obligation of protection.—The abstract right of sovereignty and obligation of protection was set forth in the award of the Permanent Court of Arbitration in the case between the United States and the Netherlands relating to the Island of Palmas, made April 4, 1928:

> Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: The obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. Without manifesting its territorial sovereignty in a manner corresponding to circumstances, the State can not fulfill this duty. Territorial sovereignty can not limit itself to its negative side—i. e., to excluding the activities of other States—for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.
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> Although municipal law, thanks to its complete judicial system, is able to recognize abstract rights of property as existing apart from any material display of them, it has none the less limited their effect by the principles of prescription and the protection of possession. International law, the structure of which is not based on any superstate organization, can not be presumed to reduce a right such as territorial sovereignty, with which almost all international relations are bound up, to the category of an abstract right, without concrete manifestations. (Arbitral Award, p. 17.)

President Coolidge on treaty of 1923.—In a message to Congress on January 10, 1927, President Coolidge gave a résumé of the events leading up to the situation existing at that time in Nicaragua and mentioned in particular the treaty of peace and amity signed at Washington by the five Central American Republics on February 7, 1923. In 1912, according to President Coolidge, the "United States intervened in Nicaragua with a large force and put down a revolution" and from "that time

until 1925 a legation guard of American marines was, with the consent of the Nicaraguan Government, kept in Managua to protect American lives and property."

On August 5, 1914, a treaty was signed by the United States and the Government of Nicaragua, by which the United States received the exclusive proprietary rights to build and operate an oceanic canal through Nicaragua as well as a 99-year lease of the islands in the Caribbean Sea known as Great Corn Island and Little Corn Island. "The consideration paid by the United States to Nicaragua was the sum of $3,000,000." "At the time of the payment of this money a financial plan was drawn up between the Nicaraguan Government and its creditors which provided for the consolidation of Nicaragua's obligations," and though the United States did not establish this plan by treaty, it "did aid through diplomatic channels and advise in the negotiations and establishment of this plan for the financial rehabilitation of Nicaragua."

In 1923, at the invitation of the United States, representatives of the five Central American countries, namely, Costa Rica, Guatemala, Honduras, Nicaragua, and Salvador met in Washington and entered into, among other treaties, a general treaty of peace and amity. Article II of this treaty specifically provides that "the Governments of the contracting parties will not recognize any other government which may come into power in any of the five Republics through a coup d'etat or revolution." "The United States was not a party to this treaty, but it was made in Washington under the auspices of the Secretary of State, and this Government has felt a moral obligation to apply its principles in order to encourage the Central American States in their efforts to prevent revolution and disorder."

In October, 1924 an election for president, vice president, and members of the Congress was held in Nicaragua, and this Government was recognized by the other Central American countries and by the United States,

and shortly afterwards the United States gave notice of its intention of withdrawing its marines. The marines, however, were not withdrawn until August, 1925, when it appeared "as though tranquillity in Nicaragua was assured." Within two months from this time General Chamorro and his supporters seized the Loma, the fortress dominating the city of Managua, and on January 16, 1926, following the resignation of President Solorzano, General Chamorro took office as President of Nicaragua. The four Central American countries and the United States refused to recognize him.

In a letter of January 22, 1926, the Secretary of State of the United States wrote to the Nicaraguan representative in Washington:

> This Government has felt privileged to be able to be of assistance in the past at their request not only to Nicaragua but to all countries of Central America, more especially during the Conference on Central American Affairs which resulted in the signing of a general treaty of peace and amity on February 7, 1923, between the five Republics of Central America. The object of the Central American countries, with which the United States was heartily in accord, was to promote constitutional government and orderly procedure in Central America, and those Governments agreed upon a joint course of action with regard to the nonrecognition of governments coming into office through coup d'état or revolution. The United States has adopted the principles of that treaty as its policy in the future recognition of Central American Governments, as it feels that by so doing it can best show its friendly disposition toward and its desire to be helpful to the Republics of Central America. (Congressional Record, vol. 68, pt. 2, pp. 1324–1326.)

Neutral zone at Bluefields.—After the coup d'état of General Chamorro in Nicaragua and the establishment of a new government, a revolution broke out in May, 1926, in the neighborhood of Bluefields on the east coast. This was at first suppressed by the troops of General Chamorro, but later a more violent revolution occurred in this district and requests were made to the United States for protection. Accordingly, the Secretary of State suggested to the Secretary of the Navy that war vessels be

sent "to the Nicaraguan ports of Corinto and Bluefields for the protection of American and foreign lives and property in case that threatened emergencies materialize." "* * * The Navy Department ordered Admiral Latimer, in command of the special service squadron, to proceed to Bluefields. Upon arriving there he found it necessary for the adequate protection of American lives and property to declare Bluefields a neutral zone. This was done with the consent of both factions; afterwards, on October 26, 1926, reduced to a written agreement, which is still in force." (Congressional Record, vol. 68, pt. 2, p. 1325.)

United States attitude.—In periods of disturbed conditions in foreign states the attitude of the United States has varied.

In the eighteenth century the United States was particularly liberal in recognizing that there was a right of revolution, and in the early days of the nineteenth century the policy of the United States was markedly in contrast to the legitimist theories at the time current in Europe. As Jefferson said in a communication to Morris in 1793:

> We surely can not deny to any nation that right whereon our own Government is founded, that everyone may govern itself according to whatever form it pleases and change these forms at its own will; and that it may transact its business with foreign nations through whatever organ it thinks proper, whether king, convention, assembly, committee, president, or anything else it may choose. The will of the nation is the only thing essential to be regarded. (1 Moore, Int. Law Digest, p. 120.)

In general this attitude was maintained up to the time of the Civil War, when domestic exigencies somewhat changed the attitude of the Northern States. This change was particularly evident, as what Mr. Seward called "an unquiet and revolutionary spirit" seemed to be spreading to other countries on the American continent. In 1866 Mr. Seward said:

> The policy of the United States is settled upon the principle that revolutions in republican states ought not to be accepted

until the people have adopted them by organic law with solemnities which would seem sufficient to guarantee their stability and permanency. This is the result of reflection upon national trials of our own.

From the time of the French Republic of 1870 there was for a period an inclination to recognize the party in de facto control of the organs dealing with international relations. Occasionally during the days of Mr. Blaine's occupancy of the office of Secretary of State policies wavered.

While during the nineteenth century questions of policy determined the attitude of the United States toward areas in which disturbed conditions prevailed, with the beginning of the twentieth century special interests of the United States in the area in which disturbed conditions prevailed became more influential. National interests, "dollar diplomacy," "big stick" policies, and the like indicated a considerable change.

The attitude toward the Caribbean, toward Mexico, toward the Central American States to the south of Mexico, toward Panama, toward the South American States, toward China, and toward disturbed areas in Europe was not uniform.

With the administration of President Wilson there was further considerable change in attitude, and a drift toward regarding attempts to overthrow governments by force as illegal on the American Continent. There was a favorable attitude toward the attempts in other parts of the world of minorities to embody themselves in political unities.

After 1921 there was a tendency to go back to an attitude involving support of de facto authority while endeavoring to clothe this in a legitimist form. The treaty of 1923 of the Central American States embodied this for that area. This did not, however, apply for the rest of the world. There was developing a sort of idea of regularization in addition to the de facto policy.

At the present time there seems to be much uncertainty as to what should be the attitude of the United States in case the legitimate authorities are unable to maintain order.

Résumé.—Under ordinary circumstances local port authorities would have jurisdiction over merchant vessels within their ports except in matters relating to the internal economy of the vessels. As to actions taking effect outside the vessel, the local authorities would have complete authority. These authorities are likewise under obligation to maintain order in the port.

In cases where local authorities have been unable to maintain order, as at times in Alaska, Bluefields, Nicaragua, Panama, China, etc., public vessels of foreign states in port at the time have often given protection not merely to their own citizens but also to other foreigners who otherwise might be in peril. It has come to be quite commonly accepted as a proper course of action that a vessel of war should in absence of other responsible authority use reasonable efforts to prevent violence.

The policy of the United States has changed from time to time in regard to recognition of States set up by revolutionary movements and in regard to the maintenance of order in the States to the south and elsewhere. In general the attitude has been that order should be maintained, and so far as its action could support order it would be available.

SOLUTION

(*a*) The *Naso*, under the situation as stated, where the local authorities are unable to maintain order owing to uprisings in the port—

(1) May not interfere in any partisan manner in a struggle, but may protect nationals of the United States and their property.

(2) When the *Naso* is the sole representative of responsible authority, if the struggle is not political, it may act to preserve life.

(3) The action should be confined to the measures essential to that end. This may involve the threat to use force or even the use of force.

(*b*) *Salvage.*

Salvage.—When assistance is rendered to a seagoing vessel which is in danger, compensation for the service in the form of salvage is due. It was recognized in early law that there was no obligation to pay salvage to any party whose duty is to serve the vessel in distress as to its crew, pilot, master, passengers, or tug. If the same persons from another vessel render aid resulting in saving a vessel in distress, salvage is allowed. Even if no amount has been agreed upon, the salvors are entitled to compensation. While a public vessel might not receive salvage for aiding a private vessel which is in peril, a private vessel might, if the conditions were reversed, be entitled to compensation. A life-saving crew in aiding a vessel in distress are simply performing their duty, as is a vessel of the Navy in affording aid to a vessel in case of mutiny on board.

The salvage contract may be inquired into by the court. If the contract is made under such conditions as involve no inequalities in the parties negotiating, as in engaging a wrecking company to raise or pull off a vessel that has been in its present condition for a year, that one or the other party had made a bad bargain, would not be a concern of the court. If, however, a vessel in immediate danger makes with the salvor a contract involving exorbitant charges, the court will take cognizance if the fact is brought to its attention. It is not the purpose of the court to allow excessive claims but to consider the elements entering into the salvor's service, such as the imminence of danger to the vessel and to the salvor, the value of the same, the skill, time, labor, degree of success, exceptional conditions, etc. Professional salvors would ordinarily be allowed a larger amount for the same service than a vessel which happened to be in the neighborhood. The reason is that the professional sal-

vage company is for the good of all to be encouraged to be available at a moment's notice to render aid and must accordingly incur the expense of such preparation for an uncertain employment of sometimes costly and exceptional equipment.

Salvage award.—The salvage award will be made by the court even if no contract has been made and even if the salvor merely responds to a call for help. The court in making the award will consider in a liberal manner the actual expenses to which the salvor has been put and then add what in its opinion is an amount sufficient to induce salvors to respond readily to calls for help and to assume the risks involved. If the claims of the salvors are not equitable in view of the conditions, or if payment to the salvor has been made under duress, the rescued vessel may find a remedy in the court.

Treaty of 1910.—A multilateral treaty relating to assistance and salvage at sea was signed at Brussels, September 23, 1910, and has since been ratified by the United States and by many other maritime states. (37 U. S. Stat., p. 1658.)

This treaty states:

ART. 6. The amount of remuneration is fixed by agreement between the parties and, failing agreement, by the court.

The proportion in which the remuneration is to be distributed among the salvors is fixed in the same manner.

The apportionment of the remuneration among the owner, master, and other persons in the service of each salving vessel is determined by the law of the vessel's flag.

ART. 7. Every agreement as to assistance or salvage entered into at the moment and under the influence of danger can, at the request of either party, be annulled or modified by the court if it considers that the conditions agreed upon are not equitable.

In all cases, when it is proved that the consent of one of the parties is vitiated by fraud or concealment, or when the remuneration is, in proportion to the services rendered, in an excessive degree too large or too small, the agreement may be annulled or modified by the court at the request of the party affected.

ART. 8. The remuneration is fixed by the court, according to the circumstances of each case, on the basis of the following considerations: (*a*) First, the measure of success obtained, the

efforts and the deserts of the salvors, the danger run by the salved vessel, by her passengers, crew, and cargo, by the salvors and by the salving vessel, the time expended, the expenses incurred and losses suffered, and the risks of liability and other risks run by the salvors, and also the value of the property exposed to such risks, due regard being had, the case arising, to the special adaptation of the salvor's vessel; (*b*) second, the value of the property salved.

The same provisions apply to the apportionment provided for by the second paragraph of article 6.

The court may reduce or deny remuneration if it appears that the salvors have by their fault rendered the salvage or assistance necessary, or have been guilty of theft, receiving stolen goods, or other acts of fraud.

ART. 11. Every master is bound, so far as he can do so without serious danger to his vessel, her crew and passengers, to render assistance to everybody, even though an enemy, found at sea in danger of being lost.

The owner of the vessel incurs no liability by reason of contravention of the foregoing provisions.

ART. 14. This convention does not apply to ships of war or to Government ships appropriated exclusively to a public service.

Legislation of the United States.—An act of March 9, 1920, provides that a United States consul may furnish security for release of a vessel owned by the United States.

SEC. 7. That if any vessel or cargo within the purview of sections 1 and 4 of this act is arrested, attached, or otherwise seized by process of any court in any country other than the United States, or if any suit is brought therein against the master of any such vessel for any cause of action arising from, or in connection with, the possession, operation, or ownership of any such vessel, or the possession, carriage, or ownership of any such cargo, the Secretary of State of the United States in his discretion, upon the request of the Attorney General of the United States, or any other officer duly authorized by him, may direct the United States consul residing at or nearest the place at which such action may have been commenced to claim such vessel or cargo as immune from such arrest, attachment, or other seizure, and to execute an agreement, undertaking, bond, or stipulation for and on behalf of the United States, or the United States Shipping Board, or such corporation as by said court required, for the release of such vessel or cargo, and for the prosecution of any

appeal; or may, in the event of such suits against the master of any such vessel, direct said United States consul to enter the appearance of the United States, or of the United States Shipping Board, or of such corporation, and to pledge the credit thereof to the payment of any judgment and cost that may be entered in such suit. The Attorney General is hereby vested with power and authority to arrange with any bank, surety company, person, firm, or corporation in the United States, its Territories and possessions, or in any foreign country, to execute any such aforesaid bond or stipulation as surety or stipulator thereon, and to pledge the credit of the United States to the indemnification of such surety or stipulator as may be required to secure the execution of such bond or stipulation. The presentation of a copy of the judgment roll in any such suit, certified by the clerk of the court and authenticated by the certificate and seal of the United States consul claiming such vessel or cargo, or his successor, and by the certificate of the Secretary of State as to the official capacity of such consul, shall be sufficient evidence to the proper accounting officers of the United States, or of the United States Shipping Board, or of such corporation, for the allowance and payment of such judgments: *Provided, however*, That nothing in this section shall be held to prejudice or preclude a claim of the immunity of such vessel or cargo from foreign jurisdiction in a proper case. (41 U. S. Stat., Pt. I, 527.)

The Porto Alexandre, 1920.—The statement of the case of the *Porto Alexandre*, which came before the British court in 1920, is as follows:

This is an appeal from a decision of Hill, J., who made an order that the writ and warrant for arrest, and all subsequent proceedings against the *Porto Alexandre* and freight, be set aside, but the proceedings against the cargo should stand. The learned judge was only concerned with the question of the ship, and this appeal has only reference to the ship.

The vessel in question was on a voyage from Lisbon to Liverpool, and she ran aground in the Mersey and three tugs were engaged to get her off. An action was brought, and the ship was arrested in respect of the services rendered to her by these tugs. The application which the learned judge granted was founded upon the contention that the vessel was the property of a sovereign state, the Republic of Portugal, and on that ground that she was exempt from arrest. The conclusion of fact at which the learned judge arrived was that it had been established that the ship was the property of the Portuguese Government at

the time of the arrest, and is still their property, and on that ground he made the order.

It is now contended that it is not sufficient for a sovereign or a sovereign state to allege that a vessel is the property of such sovereign or sovereign state, and that the allegation must go further and say the vessel is employed in the public service or on public service. ([1920] P. 30; see also, 1923 N. W. C., International Law Decisions, p. 51.)

The court further said:

In the days when the early decisions were given, no doubt what were called government vessels were confined almost entirely, if not exclusively, to vessels of war. But in modern times sovereigns and sovereign states have taken to owning ships, which may to a still greater extent be employed as ordinary trading vessels engaged in ordinary trading. That fact of itself indicates the growing importance of the particular question, if vessels so employed are free from arrest. * * *

If ships of the state find themselves left on the mud because no one will salve them when the state refuses any legal remedy for salvage, their owners will be apt to change their views. (Ibid.)

Treaty with Siam, 1920.—The treaty with Siam of 1920 definitely refers to salvage of a vessel of war:

ART. X. * * * If any ship of war or merchant vessel of one of the high contracting parties should run aground or be wrecked upon the coasts of the other, the local authorities shall give prompt notice of the occurrence to the consular officer residing in the district, or to the nearest consular officer of the other power. * * *

* * * such consular officers, owners, or agents shall pay only the expenses incurred in the preservation of the property, together with the salvage or other expenses which would have been payable in the case of the wreck of a national vessel. (42 U. S. Stat., Pt. II, p. 1931.)

Résumé.—In general, the law of the United States prohibits advanced payment for services or articles purchased. Of course, certain articles and services necessary for the carrying on of the ordinary business of the Government, such as payment for tolls, transportation in case of need, and the like, may require advanced payment.

In general, mariners are under no legal obligation to render aid to vessels in distress merely for the sake of

saving property, though there is a recognized obligation to make every effort to save life.

In the case of the *Paxto*, the local tugs do not refuse to aid in pulling the vessel off, but they do demand payment in advance. Under ordinary circumstances the obligation would be to communicate with and arrange for aid through the local consul at port P. The local consul would arrange for aid through the local authorities. The local authorities are not functioning. Accordingly the tug owners may be pursuing the only course that seems rational to them in demanding advance payment.

Under the general rules of admiralty, this might be regarded as action in duress, but admiralty courts provide that in such cases refunds in case of excessive charge shall be made. The advance payment, therefore, would not necessarily differ in amount from the equitable allowance which would be awarded by the court.

The tug owner may also be aware of the fact that he can not bring a public vessel before the court and that if he receives any payment at all, it may be after costly proceedings. There would, however, be practically no risk to the *Paxto* as the public vessel might bring the tug owner before the court in case of excessive charges.

The law of the United States forbidding advance payment in no way applies to the owner of a foreign tug, nor does it place him under any obligation to render service.

Salvage awards have been made to vessels in the naval service after July 1, 1918. (40 U. S. Stat., p. 705; see also suits in admiralty act, March 9, 1920, U. S. Comp. Stat., c. 95, sec. 1251¼; salvage act, August 1, 1912, U. S. Comp Stat., c. 268, sec. 2, sec. 7991.)

Salvage has also been awarded to other public vessels not strictly in the life-saving service. Salvage awards have also been made to vessels of the United States Shipping Board. (*The Impoco*, 287 Fed., 400.)

Owing to the fact that the local authorities are not functioning, the contract and its performance remains

wholly within the authority of the commander of the *Paxto.*

SOLUTION

(*b*) Pay for the salvage service in advance and require by force, if necessary, the rendering of the service for which payment is made.

(*c*) *Deserters.*

Act of March 4, 1915.—In 1915 an act was passed in the United States by which the provisions in regard to treatment of deserters embodied in existing treaties were to be terminated.

SEC. 16. That in the judgment of Congress articles in treaties and conventions of the United States, in so far as they provide for the arrest and imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of the United States in foreign countries, and for the arrest and imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of foreign nations in the United States and the Territories and possessions thereof, and for the cooperation, aid, and protection of competent legal authorities in effecting such arrest or imprisonment, and any other treaty provision in conflict with the provisions of this act, ought to be terminated, and to this end the President be, and he is hereby, requested and directed, within 90 days after the passage of this act, to give notice to the several governments, respectively, that so much as hereinbefore described of all such treaties and conventions between the United States and foreign governments will terminate on the expiration of such periods after notices have been given as may be required in such treaties and conventions.

SEC. 17. That upon the expiration after notice of the periods required, respectively, by said treaties and conventions and of one year in the case of the independent state of the Congo, so much as hereinbefore described in each and every one of said articles shall be deemed and held to have expired and to be of no force and effect, and thereupon section 5280, and so much of section 4081 of the Revised Statutes as relates to the arrest or imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of foreign nations in the United States and Territories and possessions thereof, and for the cooperation, aid, and protection of competent legal authorities in effecting such arrest or imprisonment shall be, and is hereby, repealed.

SEC. 18. That this act shall take effect as to all vessels of the United States, 8 months after its passage, and as to foreign vessels 12 months after its passage, except that such parts hereof as are in conflict with articles of any treaty or convention with any foreign nation shall take effect as regards the vessels of such foreign nation on the expiration of the period fixed in the notice of abrogation of the said articles as provided in section 16 of this act. (38 U. S. Stat. Pt. I, p. 1184.)

In accordance with the act of March 4, 1915, the President gave notice of the termination of the treaties in contravention of the act, and regulations brought the act into operation.

Arrest of deserters.—By an act of June 4, 1920, provision was made for arrest within the United States of deserters from the military service of the United States.

ART. 106. *Arrest of deserters by civil officials.*—It shall be lawful for any civil officer having authority under the laws of the United States, or of any State, Territory, District, or possession of the United States, to arrest offenders, summarily to arrest a deserter from the military service of the United States and deliver him into the custody of the military authorities of the United States. (41 U. S. Stat., p. 808.)

This act is, however, merely domestic legislation and does not apply to deserters from foreign vessels.

SOLUTION

(*c*) Inform the master of the *Comet* that under the act of March 4, 1915, no marines may be detailed to apprehend the deserters.

(*d*) *Closure of ports.*

Closure of ports.—The closure of ports in the time of peace for various reasons is admitted as a legitimate act of a state. In time of war closure of ports by effective blockade has long been an unquestioned right. The closure of ports in time of insurrection by the declaration of an authority not having effective control is usually regarded as of no effect. The situation in Nicaragua in 1910 led also to some discussion and statements in regard to closure of ports. This was in part embodied in a com-

munication from Mr. Wilson, the Acting Secretary of State, to Mr. Peirce, the minister to Nicaragua:

DEPARTMENT OF STATE,
Washington, July 22, 1910.

Mr. Wilson instructs Mr. Peirce immediately to hand to the minister for foreign affairs a copy of the following reply which has been sent in answer to inquiries from American companies and copy of which has been given also to the Norwegian chargé d'affaires in Washington with further explanation of the situation:

"The Bluefields Steamship Co., as charterer of Norwegian steamers carrying American goods, and seven American firms as shippers have represented that the Norwegian Government has given instructions to Norwegian consuls with the result that agents and captains have been notified by Norwegian consular officers that the Government of Norway has been informed of the closing of the port of Bluefields, in Nicaragua, which is in the territory under the de facto control of the Estrada faction, by authority of orders made by the Madriz faction last October and on May 16, and that such agents and captains have been warned that the Norwegian Government can not protect them from any consequences which may follow in disregard of such orders of closure. These firms represent that this situation means the crippling of very important commercial and other American interests on those coasts.

"'Official reports just received from Bluefields seem to indicate that the reported action of Norway may have been based upon erroneous information. In the first place, it is now a well-settled and recognized principle of international law that ports in the possession of hostile forces can not be closed to foreign commerce by mere executive decrees of closure unless such decrees are followed and supported by effective blockades of the ports so closed. It would, therefore, seem that the reported Madriz decrees of October 13 and May 16, closing the port of Bluefields, are, in the absence of effective blockade at that port, devoid of effect or influence upon neutral commerce. In the second place, it would appear that even should a foreign government recognize the right of blockade by a ship of the character of the *Venus*, apparently the only blockading force possessed by Madriz, nevertheless as it is notorious that the *Venus* has, since her appearance at that port, been absent from Bluefields for long periods, on which occasions she is reported to have violated the rules of international law by bombarding other unfortified Nicaraguan towns, and also to have committed other acts of hostility, all so far from her base at Bluefields, it would appear

clear that were the contemplated blockade of Bluefields ever effective, it has long since ceased to be so, and is therefore without any value in international law, Bluefields now being under these circumstances an open port.

"As for the question of protection of American chartered ships and American cargoes by the United States, you are referred to the telegram from the Secretary of State to the Bluefields Steamship Co., under date of November 18, 1909: 'If the announced blockade or investment of the Nicaraguan port of San Juan del Norte (Greytown) is effectively maintained and the requirements of international law, including warning to approaching vessels, are observed, this Government would not be disposed to interfere to prevent its enforcement. A naval vessel will be ordered to Greytown to observe and report whether the blockade is effective.' To the letter of the Secretary of State to the Secretary of the Navy, dated May 24, 1910, which contained the following proposed instruction to Commander Gilmer, which instruction was given: 'The United States policy as to the blockade at Bluefields, whose announcement by the Madriz faction would seem to constitute a recognition on their part of the belligerency of the Estrada faction, will naturally be the same as that laid down in regard to the blockade at Greytown by the Estrada faction. The Secretary of State then held that if the announced blockade or investment was effectively maintained, and the requirements of international law, including warning to approaching vessels, were observed, the United States Government would not be disposed to prevent its enforcement, but reserved all rights in respect to the validity of any proceedings against vessels as prizes of war. In the present instance it should, however, be observed that a vessel which, by deceiving the authorities at a port of the United States, sailed therefrom in the guise of a merchantman, but had in reality been destined for use as a war vessel, by such act has forfeited full belligerent rights, such as the right of search on the high seas and of blockade.' Also the letter of the Secretary of State to the Secretary of the Navy as of June 3, regarding a proposed instruction to Commander Gilmer, which instruction was also given: 'This Government denies the right of either faction to seize American-owned vessels or property without consent of and recompense to the owners. In such cases, if you can ascertain ownership, you will instantly act in accordance with this policy.' And the letter from the Secretary of the Navy to the Secretary of State of June 7, containing the notifications issued by Commander Gilmer under date of June 3: 'I received a communication to-day from General Rivas, commanding Madriz forces, Bluefields Bluff, stating that certain vessels have been used by Es-

trada forces and that he would not permit vessels of Bluefields Steamship Co., Atlantic Navigation Co., Bellanger Co., and Cukra Co., all American companies, to pass through the waters held by Madriz forces. I informed him that Estrada had the right to use these vessels with consent of owners if properly remunerated, but while so used Rivas had the right to capture or destroy them; but when in the company's legitimate trade I would permit no interference with them. I have ordered guard American marines or sailors on vessels passing bluff when in legitimate trade. Have informed Rivas that if they were fired upon I would return the fire and would seize the *Venus* and *San Jacinto*, and that I would permit no interference with shipping of American firms in legitimate business.'" (1910 U. S. For. Rel., p. 756.)

In 1912 the Acting Secretary of State wrote to the Mexican ambassador in regard to a port in the hands of an insurgent, saying:

I beg to inform you that, under the rules of international law, a foreign port in the hands of insurgents (except where ingress or egress from such port is physically prevented by blockade or otherwise by the parent Government) is regarded as if it were still in the hands of the parent Government and so open to the intercourse and commerce of other nations. (1912 U. S. For. Rel., p. 736.)

Later in a communication to the chargé d'affaires in Mexico the Acting Secretary said:

DEPARTMENT OF STATE,
Washington, October 23, 1912—1 p. m.

Consul at Vera Cruz has received a communication from the commandery of the fleet and late collector of customs, stating: (1) That they had sent tug to meet American steamer *Seguranza* to notify the master that the port was closed by order of the Federal Government, as provided by section 6 of customs regulations, but that master insisted upon entering to consult with consul; (2) that war material might be among the cargo of the *Seguranza*, which under no circumstances should be unloaded, as port is closed to all legal transactions of loading and unloading; (3) that on account of the existing conditions said steamer should remain a very short time, so as to avoid exposure to possible accidental damage, which might give rise to claims, thereby straining the existing friendly relations.

You will inform the Mexican Government that the department understands that insurrectionary forces have taken and are now

in possession of Vera Cruz. With reference to the closure by mere executive or legislative act of Mexican ports held by insurgents, you will communicate to the foreign office the following as the position of the United States:

"As a general principle a decree by a sovereign power closing to neutral commerce ports held by its enemies, whether foreign or domestic, can have no international validity and no extra-territorial effect in the direction of imposing any obligation upon the governments of neutral powers to recognize it or to contribute toward its enforcement by any domestic action on their part. If the sovereign decreeing such a closure have a naval force sufficient to maintain an effective blockade, and if he duly proclaim and maintain such a blockade, then he may seize, subject to the adjudication of a prize court, vessels which may attempt to run the blockade. But his decree or acts closing ports which are held adversely to him are by themselves entitled to no international respect. The Government of the United States must therefore regard as utterly nugatory such decrees or acts closing ports which the United States of Mexico do not possess, unless such proclamations are enforced by an effective blockade." (Ibid., p. 901.)

The right to close ports except by effective blockade was also denied to Ecuador.

Renouncing protection.—A state has sometimes required that aliens agree not to claim protection of the states of which they are nationals as a condition under which they may reside and do business within the territory of the state. Some states have had laws to this effect, as in the Venezuelan constitution of 1893:

ART. 9. Foreigners are entitled to enjoy all the civil rights enjoyed by natives; and they shall be accorded all the benefits of said rights in all that is essential as well as in the form or procedure, and the legal remedies incident thereto, absolutely in like manner as said natives.

ART. 149. No contract of public interest celebrated by the National Government or by that of the States can be transferred, in whole or in part, to a foreign government. In every contract of public interest there shall be inserted the clause that "doubts and controversies that may arise regarding its meaning and execution shall be decided by the Venezuelan tribunals and according to the laws of the Republic, and in no case can such contracts be a cause for international claims." (1893 U. S. For. Rel., p. 733.)

Cases where attempts were made to cause a citizen to divest himself of his right to protection by his state arose frequently during the time when Mr. Bayard was Secretary of State. Secretary Bayard in varying words announced the principle: "No agreement by a citizen to surrender the right to call on his Government for protection is valid either in international or municipal law." (1887 U. S. For. Rel., p. 100.) While it may not be within the province of a Secretary of State of the United States to pronounce upon the municipal law of a foreign state, the opinion of Mr. Bayard as to international law has received general support.

An extended study of the responsibility of states was made and appeared in a report of research preparatory to the codification of law on responsibility of states for damages done in their territory to the persons or property of foreigners. At the end of the report presented by Professor Borchard on article 17, which read, "A state is not relieved of responsibility as a consequence of any provision in its own law or in an agreement with an alien which attempts to exclude responsibility by making the decisions of its own courts final; nor is it relieved of responsibility by any waiver by the alien of the protection of the state of which he is a national," it was said:

> What conclusion may be drawn as to the effect of the renunciatory clause?
>
> The prevailing view seems to be that the mere stipulation to submit disputes to local courts is confirmatory of the general rule of international law and will be so construed by the national government of concessionaries. If, however, the renunciation goes so far as to preclude recourse to diplomatic protection in cases of denial of justice, the renunciation of protection will not be considered as binding upon the claimant's government; for as in municipal law private agreement can not oust the jurisdiction of municipal courts, so in international law the private agreement can not prevent the employment of international remedies. Again, if there has been a confiscatory breach of the contract by the government, the claimant will be relieved from the stipulation barring his right to make the contract the subject of an international claim. While some arbitrators, notably Umpire

Barge, seem to have evolved the rule that the clause is binding upon the claimant, but not on his government, it is difficult to see how such an inconsistent rule can be applied, and in fact these arbitrators have taken jurisdiction of claims in such circumstances and made awards. Finally, the right of the government to submit the claims of its citizens to an international tribunal, is, it may be concluded, superior to the right or competency of the individual to contract it away, for whatever the individual's power to renounce a personal right or privilege, he does not represent the government, and is therefore incompetent to renounce a right, duty, or privilege of the government. In sum total, therefore, the better opinion seems to be that the renunciatory clause is without any effect so far as any changes or modifications in the ordinary rules of international law are concerned. (1929 Amer. Jour. International Law, Spec. Sup., p. 215.)

SOLUTION

(*d*) Escort the *Western* into port guarding against the furnishing of aid to either party in state A. The agreement of Mr. B with the authorities of state A has no effect.

Situation III

BELLIGERENT AIRCRAFT

The United States, states X, Y, C, and D have ratified the Washington treaty of 1922 limiting naval armament and the London treaty of 1930. States X and Y are at war. Other states are neutral. The British Secretary of State for Foreign Affairs in a communication to the French, Italian, and Japanese ambassadors, October 7, 1929, stated that the Kellogg-Briand pact of 1928 was "regarded as the starting point of agreement," and that it was hoped that the conference of 1930 would elaborate a text "which will facilitate the task of the League of Nations preparation commission and of the subsequent general disarmament conference."

(*a*) The commander of an aircraft of state X summons by radio a merchant vessel of a citizen of the United States, the *Trader*, to lie to and to wait the arrival of a submarine which it is also summoning by radio. The *Trader* lies to in obedience to these orders. The aircraft leaves before the arrival of the submarine and the *Trader* then proceeds. The submarine, later meeting the *Trader*, torpedoes and sinks that vessel without warning.

(*b*) The commander of the *Hail*, a cruiser of state X in a port of the state of Panama, desires to test an aircraft that has been delivered to the *Hail* at another port and proceeds to a trial flight from the *Hail*, though the authorities of the port protest.

(1) How far in (*a*) and (*b*) above is the action of the belligerent lawful; and (2) what, if any, action should be taken by the commanders of cruisers of the United States which chance to be near?

(*c*) If the commander of the cruiser of the United States in the port of the state of Panama takes no action in regard to the conduct of the *Hail*, should the authorities of the Panama Canal Zone take any action when the *Hail* enters to pass through the Canal?

SOLUTION

(*a*) (1) The action of the submarine is not lawful, and (2) the cruiser of the United States should afford such aid as possible in rescuing the personnel of the *Trader* and report the circumstances in detail to the proper authority.

(*b*) The action of the commander of the *Hail* in proceeding to a trial flight of the aircraft in a port of the state of Panama is not lawful. The commander of the cruiser should report the circumstances in detail to the proper authority and await instructions.

(*c*) The authorities of the Panama Canal Zone should detain the *Hail*, not allowing the vessel to enter the canal without instructions from the proper authorities to whom the circumstances in detail should be reported.

NOTES

(*a*) *Law of aerial warfare.*

Law of aerial warfare.—Many writers have pointed out that the law of the air may be more nearly analogous to maritime law than to land law and that this may be true both for the time of peace and for the time of war. Some of the writers also properly point out that while there may be analogies these should not be regarded as anything more than analogies. To regard the laws as identic would lead to serious errors. Even the law of gravity must receive different recognition, and aircraft differ widely from seacraft, whether surface or subsurface. Time and space may also be less important factors. Days of grace for private aircraft of the enemy will

doubtless be taken for granted. Aerial bombardment will not be limited to the coast.

For warfare in and from the air certainly the rules should be no less strict than for maritime warfare.

If war is to continue, aerial warfare will be allowed. In this warfare aircraft will be used against other military air, surface, and subsurface craft, fortifications, etc. The hope that aerial warfare will be prohibited can not be entertained under present conditions. Aircraft have done much to reduce the significance of time and space in the conduct of war, and these factors may often determine the issue. Objection to new means of warfare have always been made, but in time of war the question is one of military effectivity. The means of delivery of an explosive shell, whether by aircraft or by gun, does not constitute the measure of its legality. Whether the projectile acts under the force of gravity in a vertical flight downward or makes a parabolic flight is not a legal question.

Aircraft in war.—The development of aircraft since 1900 has been so rapid that it is reasonable to assume that it will be an increasingly important factor in war. It may serve as "the eyes of the fleet," "the advance patrol," "the antennæ," or in other significant rôles at sea, and on land may introduce revolutionary methods of warfare, while for coast warfare the aircraft may supplement in many ways the land and sea forces.

Commerce may be interrupted in a manner hitherto impossible, and an economic war may become more effective. Some have advocated measures of control by belligerents which would to varying degrees restrict that freedom of the sea of which the United States has long been an advocate.

Aerial commerce makes old rules in regard to contraband, blockades, etc., of doubtful applicability.

Feasibility of use of aircraft.—It has often been said that owing to the fragile nature of aircraft their use for

visit and search was not feasible. Doubtless this is in great measure true if the aircraft must be self-sufficient for the exercise of visit and search. There were, however, cases reported during the World War in which aircraft did make or aid in making captures, and much that has been said in regard to the nature of aircraft as instruments of war has also been said in regard to submarines.

The *Gelderland*, a Dutch steamer, was captured by a German aircraft on the high sea, July 23, 1917, and brought to Zeebrugge. The Hamburg prize court declared the *Gelderland* good prize. Other captures were made and the transfer of prize crews from aircraft to captured vessels were reported.

The problems of visit of a maritime craft by an aircraft would be many and would depend upon the state of the sea and other conditions, and for visit of submarine craft would be more difficult even if possible. Probably visit at the place of summons would be rarely possible.

The French delegation had proposed to the commission of jurists, 1923, that "aircraft are forbidden to operate against merchant vessels, whether surface or submarine, without conforming to the rules to which surface warships are subject." Manifestly the visit and search of a submarine by an aircraft would present many difficulties, and it is doubtful if the American point of view of visit where encountered could be followed in cases sufficient to warrant the use of aircraft for such purpose. To a less degree this would be true of surface vessels. Even if the exceptional right of diversion under the proposed British article had been accepted, the nature of aircraft would tend to convert the exception into the rule.

Aircraft may, however, be of great service as auxiliary agencies of a fleet or of a surface vessel of war in locating merchant vessels of the enemy or of neutrals and even in escorting them to a place for visit and search. If this be regarded simply as an extension of the normal range of vision or gunfire of the summoning vessel, it is reasonable to admit that such a case would be action of the surface

vessel of war, and would therefore conform to the laws for surface craft.

Summons by aircraft.—Summons of a merchant vessel is the means by which the attention of such a vessel is drawn to a vessel of war which desires to communicate with the merchant vessel. The summons may be by signal flag or by any other effective method. There is not any necessary implication that the use of force is contemplated. Visit and search may or may not follow the summons. There seems to be no reason why the use of radio may not be as lawful as any other means of attracting attention or why an aircraft may not summon a merchant vessel as well as any other craft.

Aircraft as an auxiliary.—It has been proposed that aircraft be used only as auxiliary to land and naval forces and subject to the same rules and limitations. It may be pointed out that land and naval rules are not identical and that many of the differences are due to the inherent differences in land and water. Similarly the differences in the nature of air as compared with land or water will force recognition of different rules for its use, though certain broad principles may be common to the three. That operations of aircraft in time of war should not be inhuman may be admitted, but that the definition of inhuman may be the same for all can not be presumed. Many would press the law of self-preservation as applied to personal safety as analogous to state safety and hold that necessity of self-preservation of a state knows no law, while it may be capable of proof in a given case that the nationals of the state and the world at large would be better off if a named state did not exist or if it should be absorbed by another. Such rules as apply to torpedoes in naval warfare manifestly can not be made to apply without modification to aircraft projectiles. There are many lines in which analogy with land or maritime rules will not hold for war by air.

The cutting off of communications by siege or blockade has been long recognized as lawful warfare on land and

sea. The same must be admitted for aerial warfare. The destruction of a maritime supply ship of an enemy by a vessel of war of an opponent would be permitted, and it would not be unlawful for an aircraft to destroy such a ship. The capture and destruction of an enemy supply train or ammunition base on land would be lawful for land or air forces.

The significant fact that air forces may operate in spite of and independently of land or naval forces must be evident from experience and from plans which have been developed. That the three may operate most effectively in cooperation under certain conditions is not denied. The life of a nation both on land and sea no longer depends upon strategic fortifications along the coast and land frontier and naval patrols. Indeed an armed enemy convoy may, while offering protection against maritime attack, be specially vulnerable to air attack.

That aircraft may be used as an agent to weaken the civilian as well as the miltary morale of an enemy seems to require no proof, but in both cases this conduct must be kept within the law. Military objectives as legal objects of attack by land or naval forces, may be fairly easily classified. Objectives of the same nature must be admitted as legitimate for aircraft; e. g., military, naval, and aerial bases, supply bases, ammunition manufactories etc., and the location of these, whether inland from the coast or frontier, whether defended or undefended, would for aircraft be a matter of less importance than to other forces.

That aircraft should be considered in legal aspects merely as auxiliary to land and naval agencies and bound by exactly the same rules seems an untenable proposition.

Aircraft attached to vessels of war.—In 1915 the German cruiser *Konigsberg* was destroyed in a German East African river. Aircraft aided in locating and spotting the shots from the British vessels which were out of sight of the *Konigsberg*. The aircraft belonged to the Royal Naval Air Service but had been lent to the vessel of

war. When the question of distribution of prize bounty came before the court, it was decided that the pilots and the observers belonging to the two airplanes formed a part of the crews " of the vessels of war and were entitled to shares of the prize bounty. (3 Grant, Br. and Col. Prize Cases, p. 135.)

Aircraft on vessels of war.—There were examples of the use of aircraft as aids to operations against merchant vessels in the World War. The *Wolf*, a German steamer, had been fitted to prey on enemy commerce in 1916. The *Wolf* was also to lay mines, which she did in widely separated areas. The aircraft *Wolfchen* was a part of the steamer's equipment. The *Wolfchen* was found of great service in scouting and observation, discovering the proximity or absence of other vessels.

On the 27th of May, 1917, when the *Wolf* was making repairs near an uninhabited island in the South Pacific, the *Wolfchen* was sent out to bring in a steamer which had been sighted. The *Wolfchen* dropped orders on the deck of the steamer, the *Wairuna* of New Zealand, and this steamer was brought to anchor near the *Wolf*.

Later the *Hitachi Maru*, with a valuable cargo, was located by the *Wolfchen*, and the vessel was subsequently taken. (Cruise of the *Wolf*, translated from Rivista Marittima in 67 Jour. Royal United Service Institutions, p. 140.)

Washington proposals, 1922.—The attempt to elaborate rules in regard to submarines at the Washington Naval Conference, 1921–22, enunciated certain principles that failed of ratification as declaratory of international law. These rules were presented to the conference without reference to the committees to which other conventions were submitted and contained clauses to which objections were made in the meetings of the delegates themselves. Indeed, it is generally admitted that the treaty, if it had become operative, would have been difficult to interpret. In any case this Washington treaty seems to provide for deviation after seizure.

Discussion in 1923.—At The Hague Conference on Rules of Warfare, 1923, there was much discussion of the subject of deviation and visit and search by aircraft. In the Washington treaty of 1922 in regard to submarines and noxious gases there had been inserted a provision to the effect that "A merchant vessel must not be attacked unless it refuse to submit to visit and search after warning or to proceed as directed after seizure." As Judge Moore said:

> From first to last the American delegation consistently declined to enter into the interpretation of the provisions of the Washington treaty relating to submarines. This did not, however, prevent the disclosure, among other things, of the fact that the treaty was interpreted by the British delegation and perhaps by the Italian not only as permitting the deviation of a merchant vessel from its course for the completion of a search which a preliminary visit and search on the spot and seemed reasonably to justify, but also as permitting deviation without any preliminary visit and search or boarding whatsoever. The disclosure of this interpretation, which was elicited by inquiries of the Netherlands delegation, immediately rendered impossible the adoption by the commission of the terms of Article I of the Washington treaty on submarines without some additional safeguard as an appropriate and adequate regulation for aircraft. (Moore, International Law and Some Current Illusions, p. 204.)

American attitude, 1923.—The report of the committee of jurists considering the revision of the rules of warfare and particularly radio and aircraft in 1923 gave considerable attention to the use of aircraft in connection with maritime warfare. The French delegation had maintained that aircraft "should conform to the rules to which surface warships are subject."

> The American delegation considered that a merchant vessel should be boarded when she is encountered, but maintained that, even if a departure from this rule might in exceptional circumstances be permitted in visit and search by surface ships, a similar concession to aircraft, with their limited means of boarding, would readily have the effect of converting the exception into the rule. They stated that they were not advised of anything in the record of the Washington conference showing an intention to authorize

surface ships or submarines to divert merchant vessels, without boarding them, to a port for examination; but that, were the case otherwise, the Washington conference had decided that the subject of aircraft, which presented difficulties of its own and which might involve questions different from those pertaining even to submarines, should be dealt with separately; and that to permit aircraft, with their rapidity and range of flight, to control and direct by orders enforceable by bombing, and without visit and search, the movement of merchant vessels on the high seas would, in their opinion, give rise to an inadmissible situation.

The American delegation, therefore, proposed the following text:

"Aircraft are forbidden to visit and search surface or subsurface vessels without conforming in all respects to the rules to which surface vessels authorized to conduct visit and search are subject.

"In view of the irregularities to which the use of aircraft against merchant vessels might give rise, it is declared that aircraft can not divert a merchant vessel from its course without first boarding it; that in no event may an aircraft destroy a merchant vessel unless the crew and passengers of such vessel have first been placed in safety; and that if an aircraft can not capture a merchant vessel in conformity with these rules it must desist from attack and from seizure and permit such vessel to proceed unmolested." (1924 N. W. C., International Law Documents, p. 138.)

British attitude, 1923.—The British attitude was naturally influenced by recent experiences in the World War and by some of the exceptional conditions that had then prevailed. This had been shown in discussions at the Washington Conference in 1921–22, and accordingly at The Hague in 1923.

The British delegation maintained that the problem connected with visit and search of merchant vessels by aircraft was analogous to that of the exercise of such right by submarines, and that the most satisfactory solution of the problem would be to apply mutatis mutandis the wording of article 1 of the treaty signed at Washington on February 6, 1922, for the protection of the lives of neutrals and noncombatants at sea in time of war.

This delegation maintained that by using the language of that treaty, as proposed, the question of the right to oblige a merchant vessel to deviate to a reasonable extent would be solved because the wording adopted at Washington had been modified so as to

admit this right. The British delegates proposed the following text:

"The use of aircraft against merchant vessels must be regulated by the following provisions, which, being in conformity with the rules adopted by civilized nations for the protection of the lives of neutrals and noncombatants at sea in time of war, are to be deemed an established part of international law:

"'A merchant vessel must be ordered to submit to visit and search to determine its character before it can be seized.

"'A merchant vessel must not be attacked unless it refuses to submit to visit and search after warning or to proceed as directed after seizure.

"'A merchant vessel must not be destroyed unless the crew and passengers have first been placed in safety.

"'Belligerent aircraft are not under any circumstances exempt from the universal rules above stated; and if an aircraft can not capture a merchant vessel in conformity with these rules, the existing law of nations requires it to desist from attack and from seizure and to permit the merchant vessel to proceed unmolested.'" (1924 N. W. C., International Law Documents, p. 139.)

This treaty of 1922 had been the subject of considerable discussion, which led to questions as to its meaning. It had been questioned whether the rules mentioned in the first paragraph had been adopted "for the protection of lives of neutrals and noncombatants at sea in time of war" or rather had been developed through a long period of time primarily for the security of property at sea. Question was raised as to whether a merchant vessel might be seized immediately after being ordered to submit to visit and search without other action on the part of the seizing vessel. Such other questions have arisen as do the words "proceed as directed after seizure" imply amply a verbal order; is the placing of the crew and passengers of a merchant vessel in safety the sole bar to its destruction; what is a place of safety; are any of the rules as stated universal; does "existing law of nations" contain the requirements mentioned? Some have maintained that the last clause is in contradiction to some of the earlier clauses. In any case it was not possible to reach an agreement on this article either for submarines or for aircraft.

Italian attitude, 1923.—The Italian delegation at the Washington Conference had not shared the British view in regard to the place of submarines in war. At The Hague, however, in discussing rules for the use of aircraft for visit and search,

> The Italian delegation accepted the British point of view; it maintained that diversion of merchant vessels by surface warships was recognized and that the wording of the Washington treaty should be repeated. To prevent any abusive exercise of the right by aircraft, the Italian delegation proposed to add the following sentences to the paragraphs of the Washington treaty as set out in the British text.
>
> After the first paragraph add:
>
> "Visit must in general be carried out where the merchant vessel is first encountered. Nevertheless, in cases where it may be impossible to alight and there is at the same time good ground for suspicion, the aircraft may order the merchant vessel to deviate to a suitable locality, reasonably accessible, where she may be visited. If no good cause for this action is shown, the belligerent state must pay compensation for the loss caused by the order to deviate."
>
> After the third paragraph add:
>
> "If the merchant vessel is in the territorial waters of the enemy state and not on the high seas, she may be destroyed after previous notice has been given to the persons on board to put themselves in a place of safety and reasonable time has been given them for so doing." (1924 N. W. C., International Law Documents, p. 140.)

Japanese attitude, 1923.—The Japanese were not so closely concerned with the narrower legal aspects of visit and search, though their courts had, when called upon, usually followed generally accepted rules. The operation of any rules that might be proposed was, however, to them a matter of grave importance. The report of the commission says:

> The Japanese view was based on the practical difficulty in the way of exercise of the right of visit and search by aircraft. Visit and search is a necessary preliminary to capture, and unless an aircraft is physically capable of carrying it out, the recognition of the right of military aircraft to conduct operations against

merchant vessels may lead to a recurrence of the excesses practiced against enemy and neutral merchant vessels in the submarine campaign initiated during the recent war. Therefore, the Japanese delegation preferred not to recognize the right at all. But in the end, as the amended American text removed the greater part of their fear of possible abuse, they expressed readiness to accept it, and suggested at the same time that the text had better be completed by the addition of the last sentence of the British text. (1924 N. W. C., International Law Documents, p. 139.)

Report of committee of jurists, 1923.—The committee of jurists considering the rules for aircraft in time of war particularly referred to The Hague Convention of 1907 and the report of the committee of jurists specifically supports the right of a neutral to prescribe the use of its aerial space under penalty of internment. In general the proposed rules prohibit the entrance of belligerent aircraft to the jurisdiction of a neutral state, but the report says:

> While they remain on board the warship they form part of it, and should be regarded as such from the point of view of regulations issued by the neutral states. They will therefore be allowed to enter the neutral jurisdiction on the same footing as the warship on board which they rest, but they must remain on board the warship and must not commit any act which the warship is not allowed to commit. (1924 N.W.C., International Law Documents, p. 132.)

Article 42 of the proposed rules states:

> A neutral government must use the means at its disposal to prevent the entry within its jurisdiction of belligerent military aircraft and to compel them to alight if they have entered such jurisdiction.
>
> A neutral government shall use the means at its disposal to intern any belligerent military aircraft which is within its jurisdiction after having alighted for any reason whatsoever, together with its crew and the passengers, if any. (Ibid., p. 133.)

Division of opinion, 1923.—The commission of jurists in 1923 recognized the importance of rules in regard to visit and search by aircraft, and strove to reach an agreement, yet it was impossible to agree.

When put to the vote the American proposal was supported by the Japanese and Netherlands delegations and opposed by the British, French, and Italian. The French proposal was opposed by the American, British, Japanese, and Netherlands delegations. The British and Italian delegations explained that they could only support it if it was amplified in the way indicated in the British and Italian amendments.

Although all the delegations concurred in the expression of a desire to adopt such rules as would assure the observance of the dictates of humanity as regards the protection of the lives of neutrals and noncombatants, the commission, by reason of a divergence of views as to the method by which this result would best be attained, was unable to agree upon an article dealing with the exercise of belligerent rights by aircraft against merchant vessels. The code of rules proposed by the commission, therefore, leaves the matter open for future regulation. (1924 N. W. C., International Law Documents, p. 141.)

The American proposal had prohibited diversion, while under the British it had not been prohibited. The requirement which might be read into the words "proceed as directed after seizure" was not settled.

Aircraft and deviation.—The changing relations of neutral commerce in time of war owing to changes in instruments and methods of war has been particularly marked since 1900. Submarines and aircraft are among the new agencies. Of the effect of aircraft Spaight says:

Deviation is likely to become the rule, not the exception, in future. Visit and search at sea by aircraft will always probably be difficult. The ransacking of a liner will certainly be a practical impossibility. Even if visit sur place is declared obligatory, it is unlikely to be anything but perfunctory. But most probably there will be no visit at all. Ships will be ordered to named ports, and if they take the risk of disobeying the order and persist in disobeying it, they will be attacked and perhaps sunk. The conditions of 1915–1918 may be reproduced in an aggravated form.

The position of neutral commerce will indeed be well-nigh intolerable. Freedom of the sea will be dead and gone. Neutral shipping will be policed and dragooned as it never has been before. It was scourged with whips in 1914–1918; it will be scourged with scorpions in a future war. Because the complete interruption of all neutral trade beneficial to the enemy will be more

important than ever, because the grip on that trade will be tighter than ever and evasion more difficult, the conflict of belligerent and neutral interests will be sharper, the consequent disputes more bitter, and the danger of actual war with neutral states greater than in the past. (Aircraft and Commerce of War, p. 52.)

Referring to the unratified treaty, Washington Conference of 1922, on submarines and noxious gases, Spaight said in 1924:

The second paragraph of Section I of Article I prohibits attack upon a merchant vessel unless she refuses (*a*) to submit to visit and search after warning, or (*b*) to proceed as directed after seizure. The apparent implication of this provision is that she may not be attacked if she refuses to proceed as directed *before* seizure. But such a deduction would not be a justifiable one to draw. According to a statement made by the British delegation at The Hague in 1923 and recorded in the report of the commission of jurists, the original wording of the article was modified for the express purpose of allowing a warship to compel a merchant vessel to proceed to a designated place for visit and search; that is, to "proceed as directed" *before* seizure. The right to impose a reasonable degree of deviation before ever the vessel was boarded was fully recognized and was preserved, according to the British view, in Article I of the treaty. (Air Power and War Rights, p. 468.)

Discussion in 1927.—In the discussions at the Naval War College in 1927 the subject of visit and search received considerable attention (International Law Situations, pp. 43–72), and the conclusion reached was that—

Under existing international law the movements of neutral vessels on the high seas are subject to belligerent direction only when under belligerent control by a prize crew or escorting vessel. (Ibid. p. 72.)

It was shown that there had been many new practices during 1914–1918, but in the résumé it was said:

If there is a right of visit and search, and that is at the present time admitted, there must be conceded the opportunity and conditions making its exercise possible. This would imply the right to take the visited vessel to smooth or safe water, or to escort it to such a place, or to retain the custody of the visited vessel till arrival of a force adequate to exercise visit and search.

The sending of a vessel into port under a prize crew or escort presupposes a suspicion of liability to prize proceedings based on information in possession of the visiting vessel at the time. Suspicion that all vessels may be found liable is not sufficient ground for indiscriminately sending in of merchant vessels. (Ibid, p. 71.)

Preparatory disarmament conference.—In a draft convention for the preparatory disarmament conference in article 19 the provisions of article 14 of the Washington treaty limiting naval armament received some attention, repeating article 14. The draft convention reads:

ART. 19. No preparation shall be made in merchant ships in time of peace for the installation of warlike armament for the purpose of converting such ships into vessels of war, other than the necessary stiffening of decks for the mounting of guns not exceeding 6.1 inches (155 mm.) in caliber.

[134. Article 19 gave rise to a short discussion. This article, which provides that no preparation shall be made in merchant ships for the installation of warlike armaments for the purpose of converting such ships into vessels of war, nevertheless authorizes the stiffening of decks for the mounting of guns not exceeding 6.1 inches (155 millimeters) in caliber. This exception to the rule as stated was finally adopted. The Japanese delegation, however, reserved the right to raise the question of the limitation of aircraft equipment on merchant vessels, possibly at the conference itself. The Soviet delegation emphasized the importance of laying down that no preparations shall be made in merchant ships with a view to converting such ships in war time into fighting units.] (U. S. Treaty Information Bulletin No. 16, January, 1931, p. 20.)

Deviation for visit and search.—A certain degree of deviation for visit and search has always been admitted as lawful. Such deviation has been common when, because the state of the sea made it impossible to visit and search when the summoned vessel has come to, the vessel is escorted to a safer place. This is not an arbitrary act of the visiting vessel. The ordering of a neutral vessel to go to a port for examination as has been proposed at times is an exercise of authority which a belligerent craft does not possess.

A surface or submarine vessel of war is not to be allowed to deviate a merchant vessel from its course un-

less a prize crew is put on board or an escort is furnished. A mere order is of no effect, as the merchant vessel is not subject to the orders but may be under the physical control of a vessel of war so long as that is effective. Until other rules are accepted, this principle would apply to aircraft. The physical presence of the aircraft or of a prize crew would therefore be necessary for control of the *Trader*.

The submarine, according to article 22 of the London naval treaty, must "conform to the rules of international law to which surface vessels are subject," must place the "passengers, crew, and ship's papers in a place of safety" unless there has been "persistent refusal to stop on being duly summoned" or "active resistance to visit or search."

Résumé.—The American delegation, according to the report of the commission of jurists in 1923, took a position somewhat different in principle from that proposed at Washington in 1922, while the British delegation followed more closely the principles in the proposed Washington treaty. There was much difference of opinion as to the right of visit and search by aircraft, and not even a majority of votes of the delegations could be secured for any rule. There was, however, a general consensus that the use of aircraft against merchant vessels should be regulated. It was admitted that under present conditions it would be in most cases necessary to direct the merchant vessel to some place suitable for visit by aircraft or where visit and search could be otherwise conducted. It might be necessary for a merchant vessel to go far from her course at great loss and inconvenience to obey orders of an aircraft which had no well-grounded suspicion warranting interference. The delegations were not in agreement as to whether vessels of war had any recognized right to cause a merchant vessel to change her course in absence of evidence at the time in possession of the commander of the vessel of war, and not merely that a vessel in regard to which he had no evidence might be more ef-

fectively overhauled to discover whether she might be liable to visit and search. Grave extensions of the accepted rules in regard to the right of visit and search had been resorted to in the World War and extreme views were entertained by some in 1923.

The French delegation at The Hague in 1923 submitted a rule which was indefinite and left many of the debatable questions unsettled because it merely affirmed that the rule for surface craft in regard to which there was disagreement should be applicable to aircraft.

The proposed French text was:

> Aircraft are forbidden to operate against merchant vessels, whether surface or submarine, without conforming to the rules to which surface warships are subject. (1924 N. W. C., International Law Documents, p. 138.)

The American draft would specifically forbid the diversion of a merchant vessel prior to the boarding, though, as in case of a surface ship, a merchant vessel might be detained temporarily till conditions made boarding possible.

To allow an aircraft or a submarine exceptional privileges in the conduct of visit and search because of weakness or incapacity does not seem logical. A surface vessel of war is allowed to use shell fire against a merchant vessel which disregards a summoning blank shot, and in general the vessel of war is under obligations as to the safety of the passengers and crew. In similar circumstances an aircraft could rarely make provisions for the safety of passengers and crew after summons. Granting that aircraft construction remains relatively as at present, to admit some of the claims made as to aircraft rights in time of war would be to assume that the right of an instrument of war would be in inverse ratio to its capacity to carry out such rights or that disability gave exceptional rights.

Some of the arguments put forward during the World War in regard to taking or sending in merchant vessels for visit and search may equally apply to submarines and

aircraft, and if generally accepted would make possible almost unlimited interference with neutral maritime commerce.

Application of principles.—In the situation as stated, the *Trader* has come to in response to summons and has not refused to stop nor has the *Trader* offered any resistance. Effective control ceased when the aircraft departed. The order to lie to and wait is not an effective control, and the *Trader* is not more bound by it than by an order to go to a designated port without a prize crew or escort. The submarine has no right to sink the *Trader*, as it has not violated any of the provisions of article 22 of the London naval treaty and the submarine has not conformed in its action to the obligations of that treaty.

Obligation of neutral cruiser.—When a neutral cruiser is in the vicinity of any action involving a merchant vessel of its flag, it should endeavor to assure the observance of law by the merchant vessel and to protect it from any violation of law which would injure the merchant vessel. In case of need, it should render such assistance as possible. In this situation (*a*) the *Trader* has been sunk and the cruiser should rescue the personnel and convey them to a place of safety, reporting in detail the circumstances to the proper authority.

SOLUTION

(*a*) (1) The action of the submarine is not lawful, and (2) the cruiser of the United States should afford such aid as possible in rescuing the personnel of the *Trader* and report the circumstances in detail to the proper authority.

(*b*) *Canals in war time.*

Suez Canal treaty.—The treaty of October 29, 1888, signed by nine powers, including Turkey, in the preamble indicated the wish "to establish by a conventional act a definite system destined to guarantee at all times

and for all the powers the free use of the Suez Maritime Canal." Among the articles of the convention for this purpose were the following:

ARTICLE I. The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag.

Consequently the high contracting parties agree not in any way to interfere with the free use of the canal in time of war as in time of peace.

The canal shall never be subjected to the exercise of the right of blockade.

ART. IV. The maritime canal remaining open in time of war as a free passage, even to the ships of war of belligerents, according to the terms of Article I of the present treaty, the high contracting parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the canal, shall be committed in the canal and its ports of access, as well as within a radius of 3 marine miles from those ports, even though the Ottoman Empire should be one of the belligerent powers.

Vessels of war of belligerents shall not revictual or take in stores in the canal and its ports of access, except in so far as may be strictly necessary. The transit of the aforesaid vessels through the canal shall be effected with the least possible delay, in accordance with the regulations in force, and without any other intermission than that resulting from the necessities of the service.

Their stay at Port Said and in the roadstead of Suez shall not exceed 24 hours, except in case of distress. In such case they shall be bound to leave as soon as possible. An interval of 24 hours shall always elapse between the sailing of a belligerent ship from one of the ports of access and the departure of a ship belonging to the hostile power.

ART. V. In time of war belligerent powers shall not disembark nor embark within the canal and its ports of access either troops, munitions, or materials of war. But in case of an accidental hindrance in the canal men may be embarked or disembarked at the ports of access by detachments not exceeding 1,000 men, with a corresponding amount of war material.

ART. VI. Prizes shall be subjected in all respects to the same rules as the vessels of war of belligerents. (British Parliamentary Papers, Commercial No. 2 (1889), C–5623, p. 5.)

Comments on draft in 1887.—In 1887 the Marquis of Salisbury, in commenting on the clauses of the draft

treaty, which were, save for slight changes for clarity, identical with the treaty of 1888, said of some of the differences of opinion:

A second point upon which considerable controversy has arisen is the extent to which the contracting powers, for the purpose of securing the neutrality of the canal, should renounce their natural liberty in respect to acts of war or preparations for war. The project of treaty presented at the last sitting of the commission by Great Britain prohibited the "stationing" of any ships of war in the canal or its ports by a belligerent or the stationing of more than two by any power in time of peace. But it was contended, not only on the part of the French Government but of the large majority of the commission, that all acts of war and all acts directed immediately to the preparation of an operation of war should be forbidden not only in the canal but in the ports of access, in the approaches to it, and in the territorial waters of Egypt; and the fifth article of the project of treaty protocolled at the closing session as representing the views of the majority of the powers runs in those terms. As the result of discussions which have taken place subsequently, I believe the Government of France are willing to admit material modifications of this article. To Her Majesty's Government any reference to the "approaches" of the canal (which would include the Red Sea), or to the territorial waters of Egypt, independent of the canal, appears to be open to grave objections. It is not necessary for the neutralization of the canal that these waters should be in any way affected by the provisions of the treaty. Her Majesty's Government must also adhere to the objection expressed by my predecessor to the inclusion among the list of acts prohibited in the "ports of access" of "acts having for their object the direct preparation of an operation of war," even in time of peace. Such a provision might operate as a material hindrance to the preparations required for the defense of Egypt.

Similar considerations affected the sixth article of the project sanctioned by the majority of the powers in 1885, to which strong objection was taken by the British delegates. It consisted of a prohibition of the embarkation or debarkation of troops, munitions, or material of war, either in the canal or its ports of access, in time of war or in time of peace. This article appears to Her Majesty's Government now, as it did to the British delegates, to be far too wide in its application. The prohibition should be confined, in the first place, to times of war and to actual belligerents. The British delegates further contended that it should only apply to the canal, and not to the "ports of access." To this

contention it is replied that if the landing of armies for hostile purposes was going on at the mouth of the canal, efforts would certainly be made by the other belligerent to prevent the debarkation, and the prohibition of hostilities in the canal would become illusory. The difficulty felt by Her Majesty's Government in assenting to the inclusion of the ports of access in this prohibition arises not from any desire to see them used for belligerent purposes, but because it might in time of war be a serious impediment to the transit across the isthmus of reliefs for India, if the canal happened to be temporarily blocked. (Br. Parl. Paper, Egypt No. 1 (1888), C. 5255, p. 41.)

On November 4, 1887, a circular of the Marquis of Salisbury to the British representatives at Berlin, Vienna, Madrid, Rome, The Hague, St. Petersburg, Constantinople, and Cairo, contained a copy of a letter of October 26, 1887, to the British representative at Paris, in which was renewed the reservation made by Sir Julian Pauncefote at the close of the sittings of the commission of 1885. It was to the following effect:

Les Délégués de la Grande-Bretagne, en présentant ce texte de Traité comme le régime définitif destiné à garantir le libre usage du Canal de Suez, pensent qu'il est de leur devoir de formuler une réserve générale quant à l'application de ces dispositions en tant qu'elles ne seraient pas compatibles avec l'état transitoire et exceptionnel où se trouve actuellement l'Egypte, et qu'elles pourraient entraver la liberté d'action de leur Gouvernement pendant la période de l'occupation de l'Egypte par les forces de Sa Majesté Britannique. (Ibid, p. 36.)

Of this, Prof. T. E. Holland, of Oxford, writing to the London Times on October 9, 1898, said:

1. It is certainly my opinion, for what it is worth, that the full operation of the convention of 1888 is suspended by the reserves first made on behalf of this country during the sittings of the conference of 1885. These reserves were texually repeated by Lord Salisbury in his dispatch of October 21, 1887, inclosing the draft convention which three days later was signed at Paris by the representatives of France and Great Britain, the two powers which, with the assent of the rest, had been carrying on the resumed negotiations with reference to the canal. Lord Salisbury's language was also carefully brought to the notice of each of the other powers concerned in the course of the some-

what protracted discussions which preceded the final signature of the same convention at Constantinople on October 29, 1888.

2. All the signatories of the convention having thus become parties to it after express notice of "the conditions under which Her Majesty's Government have expressed their willingness to agree to it," must, it can hardly be doubted, share the view that the convention is operative only sub modo.

3. Supposing the convention to have become operative, and supposing the territorial power to be neutral in a war between States which we may call A and B, the convention would certainly entitle A to claim unmolested passage for its ships of war on their way to attack the forces of B in the eastern seas. (Letters on War and Neutrality, 3d ed., 1881–1920, p. 54.)

British Government attitude, 1898.—In July, 1898, questions were raised in regard to sojourn of Spanish vessels of war at Port Said and involving the Suez Canal convention. Mr. Curzon, Under Secretary of State for Foreign Affairs, replied:

The provisions of the Suez Canal convention to which the honorable member refers have never been brought into operation. The question of the duration of stay of foreign vessels at Port Said is one primarily for the decision of the Egyptian Government, and there has doubtless been good reason for the course adopted in this case.

Mr. Davitt. Can the right honorable gentleman state what these reasons were?

Mr. Curzon. I am not in the immediate councils of the Egyptian Government, so I can not inform the honorable member.

Mr. Gibson Bowles (Lynn Regis). Did I understand the right honorable gentleman to say that the convention of 1888 is not in actual operation?

Mr. Curzon. Yes; the honorable member did understand me to say so. (60 Parliamentary Debates, 4th series, p. 800.)

Later on Mr. Gibson Bowles said on July 12, 1898:

I beg to ask the Under Secretary of State for Foreign Affairs whether the convention between Great Britain, Austria, France, Germany, Italy, the Netherlands, Russia, Spain, and Turkey, which was signed at Constantinople on October 29, 1888, and the ratifications whereof were deposited at Constantinople on December 22, 1888, and whereof the first article declares that the Suez Canal shall always be free and open in time of war as in time of peace to every vessel of commerce or of war without distinc-

tion of flag is still in existence and in operation; and, if not, whether he can say when and under what circumstances that convention ceased to exist or to operate?

Mr. CURZON. The convention in question is certainly in existence, but, as I informed the honorable member in reply to a question some days ago, has not been brought into practical operation. This is owing to the reserves made on behalf of Her Majesty's Government by the British delegates at the Suez Canal Commission in 1885, which were renewed by Lord Salisbury, and communicated to the powers in 1887. They will be found at page 292 of the Parliamentary Paper, Egypt, No. 19, 1885.

Mr. GIBSON BOWLES. Do these reserves made in 1887 override the treaty of 1888?

Mr. CURZON. I do not express any definite opinion as to the word "override," but they are no doubt responsible for the fact, as I have already twice stated, that the terms of the convention have not been brought into practical operation. (61 Ibid., p. 667.)

Hay-Pauncefote treaty, 1901.—The treaty of 1901 between the United States and Great Britain settled many long-standing differences between the two states in regard to transisthmian rights. By the treaty a "canal may be constructed under the auspices of the Government of the United States." In article 3 of the treaty it was provided that—

The United States adopts, as the basis of the neutralization of such ship canal, the following rules, substantially as embodied in the convention of Constantinople, signed October 28, 1888,[1] for the free navigation of the Suez Canal; that is to say:

1. The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules on terms of entire equality, so that there shall be no discrimination against any such nation or its citizens or subjects in respect of the conditions or charges of traffic or otherwise. Such conditions and charges of traffic shall be just and equitable.

2. The canal shall never be blockaded, nor shall any right of war be exercised nor any act of hostility be committed within it. The United States, however, shall be at liberty to maintain such military police along the canal as may be necessary to protect it against lawlessness and disorder.

3. Vessels of war of a belligerent shall not revictual nor take any stores in the canal except so far as may be strictly necessary,

[1] It is apparently the convention of October 29, 1888, to which reference is made.

and the transit of such vessels through the canal shall be effected with the least possible delay in accordance with the regulations in force, and with only such intermission as may result from the necessities of the service.

Prizes shall be in all respect subject to the same rules as vessels of war of the belligerents.

4. No belligerent shall embark or disembark troops, munitions of war, or warlike materials in the canal except in case of accidental hindrance of the transit, and in such case the transit shall be resumed with all possible dispatch.

5. The provisions of this article shall apply to waters adjacent to the canal within 3 marine miles of either end. Vessels of war of a belligerent shall not remain in such waters longer than 24 hours at any one time except in case of distress, and in such case shall depart as soon as possible; but a vessel of war of one belligerent shall not depart within 24 hours from the departure of a vessel of war of the other belligerent.

6. The plant, establishment, buildings, and all work necessary to the construction, maintenance, and operation of the canal shall be deemed to be part thereof for the purposes of this treaty, and in time of war as in time of peace shall enjoy complete immunity from attack or injury by belligerents and from acts calculated to impair their usefulness as part of the canal. (32 U. S. Stat., pt 2, p. 1903.)

British opinion on Panama Canal.—J. H. Hall, in his book on the Law of Naval Warfare, of which the second edition appeared in 1921, after discussing the status of the Suez Canal, turns his attention briefly to the Panama Canal, saying:

The Panama Canal is governed by the terms of the Hay-Pauncefote treaty made between Great Britain and the United States of America in 1901. The canal is permanently neutralized and the maintenance of that status is insured by the terms of article 3, in which is laid down a series of rules substantially the same as those embodied in the Suez Canal convention. The canal was formally opened on August 16, 1914. Under the terms of their treaty with the Panama Republic the United States Government a fortnight later took over the control of all wireless telegraph stations, fixed or movable, in the Republic, and on October 10 the two Governments signed a protocol agreeing that during a war in which their respective countries were neutral hospitality to a belligerent warship, transport, or fleet auxiliary accorded in the territorial waters of the Panama Republic should

serve to deprive such vessel of like hospitality in the Canal Zone for the ensuing three months and vice versa. On November 13 the United States Government issued neutrality regulations for the Canal Zone which conform in general with the rules of the Thirteenth Hague convention in regard to the use of neutral ports by belligerent warships and similar vessels. Two points, however, are deserving of special notice. The normal rule admitting only three warships of a belligerent at one time is modified by allowing three to be in the terminal ports of the canal as well as three on passage, making it permissible for there to be a total maximum of six in the Canal Zone at one time. The rules of priority of departure and 24 hours interval as between the vessels of opposing belligerents are modified in the case of a belligerent warship which returns within a week of her previous departure by depriving such vessel of precedence of departure over enemy vessels, which arrive after her return and before the expiration of a week subsequent to her previous departure; the canal authorities are empowered to regulate the departure of such a vessel as they think fit with a view to preventing a constant reappearance in this manner, resulting in practice in a blockade of the canal against the vessels of the opposing belligerent (p. 181).

The Suez Canal.—During the World War the status of the Suez Canal naturally became a subject of change owing to the relations of Turkey and of Egypt as well as the relation of other political entities to the war. In January, 1915, questions came before the British prize court in Egypt in regard to the German steamship *Gutenfels*, which had on August 5, 1914, arrived at Port Said. A "décision" of the Egyptian Government of August 5, 1914, gave permission to German vessels to leave Egyptian ports up to sunset August 14. The *Gutenfels* remained at Port Said till "On October 13, she was boarded by an officer of the Egyptian Army, and her master was informed that the Egyptian Government had taken possession of her, and that a new master and crew would be sent on board. On October 16, with the Egyptian authorities still on board, she proceeded to sea, and when 3 or 4 miles out was formally seized by H. M. S. *Warrior* and brought to Alexandria." (1 Trehern, Br. and Col. Prize cases, p. 102.) The German owners maintained that the court should take under consideration all

the circumstances involved and not merely the capture by the *Warrior*, and this the court admitted and says:

Having established this point in their favor, the owners pray restoration of their vessel on the ground that Port Said is a neutral port, whose neutrality has been guaranteed by the Suez Canal convention; and it becomes our duty to consider what is the position of enemy ships which have taken refuge in the port. Are they entitled to immunity from capture while lying at anchor having no intention to pass through the canal, or does immunity only extend to them for such reasonable time as may be necessary to enable them to make a passage through it? (Ibid., p. 108.)

After considering the arrangements between the canal company and the Egyptian Government, the court finds nothing in the arrangements which can give rights to third parties like the German owners, and the case continues:

But there is another aspect of the question which has been brought about by the international convention of October 29, 1888, guaranteeing the free use of the Suez Canal, and commonly referred to as the Suez Canal convention. To this convention all the great European powers and the Sultan of Turkey were parties:

"Article 1 declares that—

"The Suez Maritime Canal shall always be free and open, in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag. Consequently the high contracting parties agree not in any way to interfere with the free use of the canal, in time of war as in time of peace. The canal shall never be subjected to the exercise of the right of blockade."

Article 4, which is the special article upon which the claimants rely, reads as follows:

"The maritime canal remaining open in time of war as a free passage even to the ships of war of belligerents, according to Article I of the present treaty, the high contracting parties agree that no right of war shall be exercised, nor shall any act of hostility, or any act having for its object to obstruct the free navigation of the canal, be committed in the canal and its ports of access, nor within a radius of 3 marine miles from those ports, even though the Ottoman Empire should be one of the belligerent powers"; and special provision is made as to the passage and victualing of vessels of war. (Ibid., p. 110.)

Other articles provide for oversight and protection of the canal and that in other respects the sovereign rights of the Sultan of Turkey and the Khedive of Egypt "are not to be affected." Of this the court says:

In view of these provisions there is a grim touch of humor about the present situation, seeing that the Ottoman Government, under German direction, is at this moment seeking to destroy the canal, while a German ship taken by the Egyptian Government asks in a British prize court for a declaration of release on the ground that the canal precincts are absolutely inviolable.

The passages that I have cited are all that, in my opinion, are material to the issue. Can it be said that this convention gives the right to any ship to shelter itself indefinitely, or at all, in the ports ancillary to the canal because they happen to be within the limits of the operations of the canal company? I think not. In my opinion, the sole object of the treaty, as expressed both in its preamble and operative articles, is to insure a free and uninterrupted passage of the canal at all times to all ships of all nations of the world; and if in the unlikely event of a German ship now entering Suez or Port Said and demanding a free passage, I think it would be the plain duty of the British Government (after taking proper precautions to prevent damage to the canal itself) to allow such ship to pass through and sail out at the other end; and I have no reason to suppose that the British Government would fail in its duty. But that is the limit of its obligation; and if a ship enters Suez or Port Said without any intention of going through the canal, or, being in either of those ports, abandons any intention it may have had of passing through, I am of opinion that she ceases to have any rights whatever under the convention. The object of the convention is to insure a free passage through the canal, and nothing else, and all prohibitions against acts of hostility within the canal precincts are framed with that object and that alone. (Ibid., p. 111.)

Suez Canal and Port Said.—In 1914 several German merchant vessels which entered Port Said claimed protection under that part of article 4 of the Suez Canal convention of 1888, which is as follows:

The maritime canal remaining open in time of war as a free passage, even to the ships of war of the belligerents, according to the terms of article 1 of the present treaty, the high contracting parties agree that no right of war, no act of hostility, nor any act having for its object to obstruct the free navigation of the canal,

shall be committed in the canal and its ports of access, as well as within a radius of 3 marine miles from those ports, even though the Ottoman Empire should be one of the belligerent powers. (2 Grant, Br. and Col. Prize Cases, p. 148n.)

These vessels were by persons employed by the Egyptian authorities taken outside territorial waters, where they were immediately captured by British vessels of war and taken before a prize court, where they were condemned as good prize. The case of the *Pindos* making "a round voyage from Antwerp to eastern Mediterranean ports," the *Helgoland* "bound with general cargo from Singapore to Rotterdam and Bremen," and the *Rostock* came at the same time before the judicial committee of the Privy Council on appeal, and in dismissing the appeal their lordships in part said:

The *Rostock* was a steamship of 4,957 tons gross which belonged to the Deutsche-Australische Dampfschiffsgesellschaft, of Hamburg. She came through the Suez Canal from eastern ports with general cargo bound, no doubt, for a home port, and arrived at Port Said on July 31 and began to discharge such part of her cargo as was deliverable there. While doing so her captain received a cablegram from his owners at Hamburg to wait further orders. His log records on August 1: "In order to protect ship and cargo from the attacks of the enemy shall remain until further notice in Port Said, as the harbor is neutral." On August 17 to 19 the ship discharged her cargo of frozen meat. After July 31 the captain received no further communication from his owners. He was treated by the Egyptian authorities in respect of the offer of a pass, the actual delivery of a valid pass subsequently, and the removal of his ship outside Egyptian territorial waters, exactly as the captains of the *Pindos* and the *Helgoland* were treated. He behaved in the same way and for the same reasons. The *Rostock* was captured by the *Warrior* on October 15 and was condemned as prize on February 17, 1915.

The claimants in their petitions formally relied on what in each case were substantially the same defenses—namely, first, the benefit of the Sixth Hague Convention of 1907, articles 1 and 2; secondly, the benefit of article 4 of the Suez Canal convention of 1888, confirmed by article 6 of the Anglo-French agreement of 1904; thirdly, the formal invalidity and the practical inefficiency of the passes which were offered by the Egyptian authorities; and fourthly, considerations of equity and natural justice arising

out of the circumstances under which the ships were ejected from Egyptian waters.

Of these points the first has already been dealt with sufficiently by their lordships in the case of *The Gutenfels* [1916] (ante, p. 36; 85 L. J. P. C. 140), and the third in that of *The Achaia* [1916] (ante, p. 45; 85 L. J. P. C. 155). Of the second all that need be said is this: Whatever question can be raised as to the parties to and between whom the Suez Canal convention, 1888, is applicable, and as to the interpretation of its articles, one thing is plain, that the convention is not applicable to ships which are using Port Said, not for the purposes of passage through the Suez Canal or as one of its ports of access, but as a neutral port in which to seclude themselves for an indefinite time in order to defeat belligerents' rights of capture after abandoning any intention which there may ever have been to use the port as a port of access in connection with transit through the canal. Those responsible for the ships took their course deliberately, and took it before August 14. The captains appear, as was only natural, to have consulted together and to have acted in concert. In the case of the *Helgoland* her owners in Bremen, doubtless well-informed persons, as early as Thursday, July 30, 1914, if not earlier, were so assured, though no ultimatum had then been issued, that Germany would shortly be at war, and England and Egypt would be neutral; that they ordered her captain to stop in Port Said instead of trying to reach a Turkish, a Greek, an Italian, or an Austrian port. It is no light responsibility to stop a ship of over 5,000 tons with general cargo in midvoyage for an indefinite period, and thus to imperil insurances alike on ship and cargo, and to incur heavy expenses and probably heavy claims from cargo owners as well; but this responsibility was taken. Their lordships are of opinion that the evidence amply justified the decision of the prize court in each case; that the ships were using Port Said simply as a port of refuge, and therefore without any right or privilege arising out of the Suez Canal convention, 1888. Hence their expulsion by the Egyptian authorities when it had become plain that they would not leave of themselves affords no answer to the claim for condemnation in natural justice, or equity, or law. (Ibid., p. 148.)

Case of the "Derfflinger."—The *Derfflinger* was a German vessel which by its build showed that it was intended for conversion into a vessel of war. Coming from the east, she passed through the Suez Canal, arriving at Port Said August 2, 1914. The Hague convention in regard to days of grace does not apply to vessels whose build

shows they are intended for conversion into vessels of war. The log of the *Derfflinger* had the following entries:

1914, August 2: Arrived Port Said. The journey can not be continued on account of the war.

August 3: Passengers and baggage landed. (2 Grant, Br. and Col. Prize Cases, p. 36.)

The judgment of the judicial committee of the Privy Council stated:

Under the International Suez Canal convention of 1889, she was entitled to use the canal for the purposes of passage. She had used it, and the above entries show that her voyage of passage was over; that her journey was, in her view, rendered abortive by reason of the war, and that she had accordingly landed her passengers and cargo. Port Said was, on August 2 and 3, a neutral port. The war which caused the discontinuance of the ship's voyage was the war between Germany and France and that between Germany and Russia. When war broke out on August 4 between Germany and Great Britain the vessel was lying in Port Said, not in exercise of a right of passage but by way of user of the port as a port of refuge.

Under these circumstances the canal convention had ceased to be operative and she was not entitled to any protection. The ship was a German ship lying in an enemy port, and was a ship to which the Hague convention did not apply. (Ibid, p. 44.)

Kiel Canal.—Article 380 of the treaty of Versailles June 28, 1919, provided that that canal should be open to vessels of commerce and of war in terms somewhat similar to those used in the Suez and Panama conventions:

ART. 380. The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality.

Questions arose in regard to this clause in 1921. The *Wimbledon*, a British vessel, chartered by a French company, carrying munitions loaded at Salonica bound for Poland via Danzig, had been refused permission by Germany to pass through the Kiel Canal on March 21, 1921. The German neutrality in the war between Russia and Poland was given as the reason for the refusal.

This action of Germany came before the Permanent Court of International Justice and was the subject of its first judgment commonly known as the case of the *Wimbledom*. The judgment was rendered August 17, 1923, and in addition to Germany the parties were Great Britain, France, Italy, Japan, and Poland.

Sir Cecil Hurst, speaking before the court for Great Britain, said:

> In each of the international instruments, therefore, which fix the régime for the Suez Canal and for the Panama Canal, respectively, words are employed which are identical with those used in article 380 of the treaty of Versailles with regard to the Kiel Canal. I think it is reasonable to ask the court to draw the inference that if the framers of the treaty of Versailles used identical language with regard to the Kiel Canal to that which had been used in regard to the Suez and Panama Canals, they intended to establish for the Kiel Canal a régime analagous to that which existed in regard to those other great maritime waterways. (Publications of the Permanent Court of International Justice, series C, No. 3, vol. 1, p. 254.)
>
> Now, what really is the régime which has been created for these other waterways at Suez and Panama? They have been constituted into highways open for all kinds of navigation, not merely the navigation of commerce, but also for the more serious navigation of war. They have been constituted in this way into great international highways by instruments which operate not merely as between the parties to those instruments, but which operate for the benefit of all nations. (Ibid. p. 256.)

After discussing the obligation of neutral states to refuse to belligerent vessels of war the use of their inland waterways, Sir Cecil Hurst further says:

> Does that principle apply to these great international waterways which I have mentioned—the Suez Canal, the Panama Canal, and the Kiel Canal? In the instruments regulating the régime for those waterways, you will find in several places that the passage of warships is provided for, and it is provided for in terms which enable those warships to pass even when they are the warships of a belligerent power and when the territorial sovereign of the area in which the canal is situated remains neutral.
>
> Consequently, I think it is clear that the régime established for these great international waterways is, in matters relating to

neutrality, a very special régime, and that the normal principles which obtain with regard to the obligations of neutrality do not attach to these waterways at all.

I have mentioned the case of ships of war, but that is not the only way in which the question arises. There is not merely the question of ships of war; there is the case of vessels which are assimilated to vessels of war—storeships, prizes, and so on. There is also the case of the ordinary transportation of contraband. (Ibid., p. 258.)

In referring to arguments as to the analogy of the Suez and Panama Canals and the Kiel Canal, the German representative before the court said:

They argue that these various articles, having the same wording have the same object, and involve the same rights and obligations.

Let us proceed to a comparison.

The Suez Canal act, Article I, paragraph 1, runs:

"The Suez Maritime Canal shall always be free and open in time of war as in time of peace, to every vessel of commerce or of war, without distinction of flag."

The Panama Canal act, Hay-Pauncefote treaty of November 18, 1901, says:

"The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality."

The provisions referring to the Kiel Canal (article 380 of the treaty of Versailles) say:

"The Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality."

So it is true that the article relating to the Kiel Canal begins by a similar phrase to that used in the corresponding article in the Suez Canal convention; but the sense of the text as regards the Kiel Canal is narrower. It will be observed that the words "in time of war as in time of peace" are lacking in the Kiel Canal article and the Panama Canal convention; they only appear in the Suez Canal convention.

With regard to the Kiel Canal, the article limits freedom of passage to nations "at peace with Germany"; and the Panama Canal convention has the words "observing these rules," subjecting the user of the canal to a series of regulations which are to be drawn up. In the French text of the Kiel Canal article the word "toujours" appears, but the word "always" does not appear in the English text. "Always" appears both in English and French

in the Suez Canal convention, where it does not at all appear in the Panama convention.

Article I, paragraph 1, of the Suez Canal convention, relating to freedom of passage, is followed by paragraph 2, which says:

"Consequently, the high contracting parties agree not in any way to interfere with the free use of the canal in time of war as in time of peace."

No such paragraph is found in the Kiel article, nor does it appear in the Panama Canal convention.

Also paragraph 3 of Article I of the Suez Canal act relates to the impossibility of blockading the canal, so that it must be considered as neutralized. Provisions to this effect are to be found in the Panama Canal convention, but not in the articles relating to the Kiel Canal.

The provisions of article 381, paragraph 2, are not to be found either in the Suez or the Panama convention.

As regards the question of defense, whilst article 10 of the Suez convention admits the right to establish defenses on the Canal, Article II adds, "but not in such a way as to hinder the free passage of ships." Article 23 of the Hay-Pauncefote convention of 1903 admits the right of defense, unhindered by this restriction. (Ibid., p. 345.)

In its decision the court considered that the Kiel Canal had "ceased to be an internal and national waterway" and had become an "international waterway" open to vessels of states at peace with Germany, even if at war with each other. The court also recognized that the rules were not the same for the Suez, Panama, and Kiel Canals, but that their intent was to establish international waterways of which the use by belligerents might not be incompatible with neutral obligations of the authority having jurisdiction along the route of the canal. The court says in the decision:

The precedents therefore afforded by the Suez and Panama Canals invalidate in advance the argument that Germany's neutrality would have necessarily been imperiled if her authorities had allowed the passage of the *Wimbledon* through the Kiel Canal, because that vessel was carrying contraband of war consigned to a state then engaged in an armed conflict. Moreover they are merely illustrations of the general opinion according to which when an artificial waterway connecting two open seas has been permanently dedicated to the use of the whole world such

waterway is assimilated to natural straits in the sense that even the passage of a belligerent man-of-war does not compromise the neutrality of the sovereign state under whose jurisdiction the waters in question lie. (Idem., series A, p. 28.)

SOLUTION

(*b*) The action of the commander of the *Hail* in proceeding to a trial flight of the aircraft in a port of the state of Panama is not lawful. The commander of the cruiser should report the circumstances in detail to the proper authority and await instructions.

(*c*) Panama Canal Zone.

Treaties with Panama.—The treaties between the United States and Panama since 1903 have shown a close relationship between the two states. The existence of the Panama Canal under the management of the United States and the control of the Canal Zone have made this essential to both states. Article I of the convention of 1903 reads:

> The United States guarantees and will maintain the independence of the Republic of Panama. (33 U. S. Stat., pt. 2, p. 2234.)

Panama's neutrality, 1914.—The necessity of joint action by the United States, and sometimes control in Panama has been seen in many acts. This is evident in Decree No. 130 of 1914:

> The President of the Republic, in the exercise of his legal powers, and considering:
>
> That by the terms of the Bunau-Varilla-Hay treaty the Republic of Panama is obliged to assist the United States by all necessary and suitable measures for the conservation, protection, and defense of the interoceanic canal constructed across the Isthmus:
>
> That the said Government considers it indispensable to this end that it shall assume from now on permanent and complete control of the wireless telegraphic stations, fixed and movable, in all the territory, and territorial waters of the Republic of Panama; and
>
> That it is to the interest and for the safety of the Republic of Panama that wireless communication be controlled and regulated by the nation which by a solemn pact has guaranteed its independence;

It is decreed: From this date the radiotelegraphic stations, fixed and movable, and everything relating to wireless communications in the territory and territorial waters of Panama shall be under the complete and permanent control of the United States of America; and to attain that end said Government will take the measures which it deems necessary.

Let it be communicated and published.

Done at Panama this 29th day of August, 1914.

BELISARIO PORRAS.

The Secretary of Government and Justice:
JUAN B. SOSA.

(1914 U. S. For. Rel., p. 1051.)

On October 10, 1914, an agreement was entered into between the United States and Panama:

The undersigned, the Acting Secretary of State of the United States of America and the envoy extraordinary and minister plenipotentiary of the Republic of Panama, in view of the close association of the interests of their respective Governments on the Isthmus of Panama, and to the end that these interests may be conserved, and that when a state of war exists the neutral obligations of both Governments as neutrals may be maintained, after having conferred on the subject and being duly empowered by their respective Governments, have agreed:

That hospitality extended in the waters of the Republic of Panama to a belligerent vessel of war or a vessel belligerent or neutral, whether armed or not, which is employed by a belligerent power as a transport or fleet auxiliary or in any other way for the direct purpose of prosecuting or aiding hostilities, whether by land or sea, shall serve to deprive such vessel of like hospitality in the Panama Canal Zone for a period of three months, and vice versa.

In testimony whereof, the undersigned have signed and sealed the present protocol in the city of Washington this 10th day of October, 1914.

ROBERT LANSING.
EUSEBIO A. MORALES.

(38 U. S. Stat, pt. 2, p. 2042.)

The proclamation of the United States, November 19, 1914, in regard to the neutrality of the Canal Zone, contained rules as to aircraft.

RULE 15. Aircraft of a belligerent power, public or private, are forbidden to descend or arise within the jurisdiction of the United

States at the Canal Zone, or to pass through the air spaces above the lands and waters within said jurisdiction.

RULE 16. For the purpose of these rules the Canal Zone includes the cities of Panama and Colon and the harbors adjacent to the said cities. (38 U. S. Stat., pt. 2, p. 2039.)

Swiss ordinance, 1914.—The geographical location of Switzerland, surrounded by belligerents, made it essential that so far as possible the Swiss neutrality regulations should be clear. A somewhat detailed ordinance was issued on August 4, 1914, soon after the outbreak of the World War. This ordinance provided for aviation in prescription 17.

As to aviation, attention will be given to what follows:

(*a*) Balloons and aircraft not belonging to the Swiss Army can not rise and navigate in the aerial space situated above our territory unless the persons ascending in the apparatus are furnished with a special authorization, delivered in the territory occupied by the army, by the commander of the army; in the rest of the country, by the federal military department.

(*b*) The passage of all balloons and aircraft coming from abroad into our aerial space is forbidden. It will be opposed if necessary by all available means, and these aircraft will be controlled whenever that appears advantageous.

(*c*) In case of the landing of foreign balloons or aircraft, their passengers will be conducted to the nearest superior military commander, who will act according to his instructions. The apparatus and the articles which it contains ought, in any case, to be seized by the military authorities or the police. The federal military department or the commander of the army will decide what ought to be done with the personnel and matériel of a balloon or aircraft coming into our territory through force majeure and when there appears to be no reprehensible intention or negligence. (1916 N. W. C., International Law Topics, p. 73.)

In the notification to the French Government, August 8, 1914, it was said:

The Swiss Federal Government has notified the Government of the Republic under date of August 8, 1914, that in view of the maintenance of the neutrality of Switzerland it is forbidden to all balloons and aircraft coming from a foreign country to pass in the aerial space above the Swiss territory. All means will be taken, if necessary, to prevent this passage. (Ibid. 77.)

Delivery of aircraft in neutral ports.—Article 18 of Thirteenth Hague Convention, 1907, provides:

> Belligerent ships of war can not make use of neutral ports, roadsteads, or territorial waters for replenishing or increasing their supplies of war material or their armament or for completing their crews. (Hague and Geneva Conventions, 1911, p. 124.)

This article in effect embodies a part of article 5 of the treaty of Washington, 1871, as applied to belligerents.

At the present time aircraft may be and are often an essential part of the armament of a vessel of war, and a neutral is justified or under obligation to assume that aircraft are a part of the armament. The delivery of the aircraft to the *Hail* in this situation is therefore in contravention of the principles of The Hague Convention.

Cruiser of X in neutral ports.—The *Hail*, a cruiser of State X, has acted in a manner contrary to article 18 of Thirteenth Hague Convention, 1907, and accordingly not in accord with the treaty of Washington of 1871. The principle embodied in article 18 is one of the most widely accepted in preventing increase of armament in a neutral port. In the neutral port in the State of Panama the testing of an aircraft would likewise be contrary to the spirit of Thirteenth Hague Convention, 1907, which in article 1 enjoins respect for the rights of neutral States, among which is that to determine the use of aerial space above its territory.

The authorities of the port of the State of Panama are justified in protesting against the trial flight of the aircraft from the *Hail* and may take such action as may be necessary to prevent the flight or may intern the *Hail.*

The commander of the cruiser of the United States, not being under the authority of Panama, should report the facts to the proper authorities of the United States and await instructions.

Panama and the Panama Canal.—As under the terms of the treaty of 1903, the United States guarantees and will maintain the independence of Panama, it is not

necessary for Panama to support forces for this purpose. The United States and Panama took action in cooperation during the World War for the maintenance of their rights. The agreement of October 10, 1914, made provision for reciprocal hospitality to belligerent vessels of war. The *Hail* had violated the neutrality of Panama, and entering the Panama Canal Zone comes within an area in which the flight of belligerent aircraft had in 1914 been specifically prohibited. Under the relations existing between the United States and Panama, and in view of the previous acts of the *Hail*, Panama might properly look to the United States for some action in support of its protest against a violation of its neutrality. Accordingly it would seem that the least that the authorities of the Panama Canal Zone could do would be to detain the *Hail* pending instructions from the proper authorities, to whom the circumstances in detail should be reported.

SOLUTION

(*c*) The authorities of the Panama Canal Zone should detain the *Hail*, not allowing the vessel to enter the canal without instructions from the proper authorities to whom the circumstances in detail should be reported.

LONDON NAVAL TREATY OF 1930

TEXT OF THE TREATY SIGNED AT LONDON, APRIL 22, 1930, INVITATION TO THE LONDON NAVAL CONFERENCE, REPLY OF THE UNITED STATES, AND JOINT STATEMENT OF THE PRESIDENT OF THE UNITED STATES AND THE BRITISH PRIME MINISTER

I

II

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LONDON NAVAL TREATY OF 1930

I

Text of the treaty

The President of the United States of America, the President of the French Republic, His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, His Majesty the King of Italy, and His Majesty the Emperor of Japan,

Desiring to prevent the dangers and reduce the burdens inherent in competitive armaments, and

Desiring to carry forward the work begun by the Washington Naval Conference and to facilitate the progressive realization of general limitation and reduction of armaments,

Have resolved to conclude a Treaty for the limitation and reduction of naval armament, and have accordingly appointed as their Plenipotentiaries:

The President of the United States of America:

Henry L. Stimson, Secretary of State;

Charles G. Dawes, Ambassador to the Court of St. James;

Charles Francis Adams, Secretary of the Navy;

Joseph T. Robinson, Senator from the State of Arkansas;

David A. Reed, Senator from the State of Pennsylvania;

Hugh Gibson, Ambassador to Belgium;

Dwight W. Morrow, Ambassador to Mexico;

The President of the French Republic:

Mr. André Tardieu, Deputy, President of the Council of Ministers, Minister of the Interior;

Mr. Aristide Briand, Deputy, Minister for Foreign Affairs;

Mr. Jacques-Louis Dumesnil, Deputy, Minister of Marine;

Mr. François Piétri, Deputy, Minister of the Colonies;

Mr. Aimé-Joseph de Fleuriau, Ambassador of the French Republic at the Court of St. James;

His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India:

for Great Britain and Northern Ireland and all parts of the British Empire which are not separate Members of the League of Nations:

The Right Honourable James Ramsay MacDonald, M.P., First Lord of His Treasury and Prime Minister;

The Right Honourable Arthur Henderson, M.P., His Principal Secretary of State for Foreign Affairs;

The Right Honourable Albert Victor Alexander, M.P., First Lord of His Admiralty;

The Right Honourable William Wedgwood Benn, D.S.O., D.F.C., M.P., His Principal Secretary of State for India;

for the Dominion of Canada:

Colonel The Honourable James Layton Ralston, C.M.G., D.S.O., K.C., a Member of His Privy Council for Canada, His Minister for National Defence;

The Honourable Philippe Roy, a Member of His Privy Council for Canada, His Envoy Extraordinary and Minister Plenipotentiary in France for the Dominion of Canada;

for the Commonwealth of Australia:

The Honourable James Edward Fenton, His Minister for Trade and Customs;

for the Dominion of New Zealand:

Thomas Mason Wilford, Esquire, K.C., High Commissioner for the Dominion of New Zealand in London;

for the Union of South Africa:

Charles Theodore te Water, Esquire, High Commissioner for the Union of South Africa in London;

for the Irish Free State:

Timothy Aloysius Smiddy, Esquire, High Commissioner for the Irish Free State in London;

for India:

Sir Atul Chandra Chatterjee, K.C.I.E., High Commissioner for India in London;

His Majèsty the King of Italy:

The Honourable Dino Grandi, Deputy, His Minister Secretary of State for Foreign Affairs;

Admiral of Division The Honourable Giuseppe Sirianni, Senator of the Kingdom, His Minister Secretary of State for Marine;

Mr. Antonio Chiaramonte-Bordonaro, His Ambassador Extraordinary and Plenipotentiary at the Court of St. James;

Admiral The Honourable Baron Afredo Acton, Senator of the Kingdom;

His Majesty the Emperor of Japan:

Mr. Reijiro Wakatsuki, Member of the House of Peers;

Admiral Takeshi Takarabe, Minister for the Navy;

Mr. Tsuneo Matsudaira, His Ambassador Extraordinary and Plenipotentiary at the Court of St. James;

Mr. Matsuzo Nagai, His Ambassador Extraordinary and Plenipotentiary to His Majesty the King of the Belgians;

Who, having communicated to one another their full powers, found in good and due form, have agreed as follows:

PART I.

Article 1.

The High Contracting Parties agree not to exercise their rights to lay down the keels of capital ship replacement tonnage during the years 1931–1936 inclusive as provided in Chapter II, Part 3 of the Treaty for the Limitation of Naval Armament signed between them at Washington on the 6th February, 1922, and referred to in the present Treaty as the Washington Treaty.

This provision is without prejudice to the disposition relating to the replacement of ships accidentally lost or destroyed contained in Chapter II, Part 3, Section I, paragraph (*c*) of the said Treaty.

France and Italy may, however, build the replacement tonnage which they were entitled to lay down in 1927 and 1929 in accordance with the provisions of the said Treaty.

Article 2.

1. The United States, the United Kingdom of Great Britain and Northern Ireland and Japan shall dispose of the following capital ships as provided in this Article:

United States:
"Florida".
"Utah".
"Arkansas" or "Wyoming".
United Kingdom:
"Benbow".
"Iron Duke".
"Marlborough".
"Emperor of India".
"Tiger".
Japan:
"Hiyei".

(*a*) Subject to the provisions of sub-paragraph (*b*), the above ships, unless converted to target use exclusively in accordance with Chapter II, Part 2, paragraph II(*c*) of the Washington Treaty, shall be scrapped in the following manner:

One of the ships to be scrapped by the United States, and two of those to be scrapped by the United Kingdom shall be rendered unfit for warlike service, in accordance with Chapter II, Part 2, paragraph III(*b*) of the Washington Treaty, within twelve months from the coming into force of the present Treaty. These ships shall be finally scrapped, in accordance with paragraph II(*a*) or (*b*) of the said Part 2, within twenty-four months from the said coming into force. In the case of the second of the ships to be scrapped by the United States, and of the third and fourth of the ships to be scrapped by the United Kingdom, the said periods shall be eighteen and thirty months respectively from the coming into force of the present Treaty.

(*b*) Of the ships to be disposed of under this Article, the following may be retained for training purposes:

by the United States: "Arkansas" or "Wyoming".
by the United Kingdom: "Iron Duke".
by Japan: "Hiyei".

These ships shall be reduced to the condition prescribed in Section V of Annex II to Part II of the present Treaty. The work of reducing these vessels to the required condition shall begin, in the case of the United States and the United Kingdom, within twelve months, and in the case of Japan within eighteen months from the coming into force of the present Treaty; the work shall be completed within six months of the expiration of the above-mentioned periods.

Any of these ships which are not retained for training purposes shall be rendered unfit for warlike service within eighteen months, and finally scrapped within thirty months, of the coming into force of the present Treaty.

2. Subject to any disposal of capital ships which might be necessitated, in accordance with the Washington Treaty, by the building by France or Italy of the replacement tonnage referred to in Article 1 of the present Treaty, all existing capital ships mentioned in Chapter II, Part 3, Section II of the Washington Treaty and not designated above to be disposed of may be retained during the term of the present Treaty.

3. The right of replacement is not lost by delay in laying down replacement tonnage, and the old vessel may be retained until replaced even though due for scrapping under Chapter II, Part 3, Section II of the Washington Treaty.

ARTICLE 3.

1. For the purposes of the Washington Treaty, the definition of an aircraft carrier given in Chapter II, Part 4 of the said Treaty is hereby replaced by the following definition:

> The expression "aircraft carrier" includes any surface vessel of war, whatever its displacement, designed for the specific and exclusive purpose of carrying aircraft and so constructed that aircraft can be launched therefrom and landed thereon.

2. The fitting of a landing-on or flying-off platform or deck on a capital ship, cruiser or destroyer, provided such vessel was not designed or adapted exclusively as an aircraft carrier, shall not cause any vessel so fitted to be charged against or classified in the category of aircraft carriers.

3. No capital ship in existence on the 1st April, 1930, shall be fitted with a landing-on platform or deck.

ARTICLE 4.

1. No aircraft carrier of 10,000 tons (10,160 metric tons) or less standard displacement mounting a gun above 6.1-inch (155 mm.) calibre shall be acquired by or constructed by or for any of the High Contracting Parties.

2. As from the coming into force of the present Treaty in respect of all the High Contracting Parties, no air-

craft carrier of 10,000 tons (10,160 metric tons) or less standard displacement mounting a gun above 6.1-inch (155 mm.) calibre shall be constructed within the jurisdiction of any of the High Contracting Parties.

Article 5.

An aircraft carrier must not be designed and constructed for carrying a more powerful armament than that authorized by Article IX or Article X of the Washington Treaty, or by Article 4 of the present Treaty, as the case may be.

Wherever in the said Articles IX and X the calibre of 6 inches (152 mm.) is mentioned, the calibre of 6.1 inches (155 mm.) is substituted therefor.

PART II.

Article 6.

1. The rules for determining standard displacement prescribed in Chapter II, Part 4 of the Washington Treaty shall apply to all surface vessels of war of each of the High Contracting Parties.

2. The standard displacement of a submarine is the surface displacement of the vessel complete (exclusive of the water in non-water-tight structure) fully manned, engined, and equipped ready for sea, including all armament and ammunition, equipment, outfit, provisions for crew, miscellaneous stores, and implements of every description that are intended to be carried in war, but without fuel, lubricating oil, fresh water or ballast water of any kind on board.

3. Each naval combatant vessel shall be rated at its displacement tonnage when in the standard condition. The word "ton", except in the expression "metric tons", shall be understood to be the ton of 2,240 pounds (1,016 kilos.).

Article 7.

1. No submarine the standard displacement of which exceeds 2,000 tons (2,032 metric tons) or with a gun above 5.1-inch (130 mm.) calibre shall be acquired by or constructed by or for any of the High Contracting Parties.

2. Each of the High Contracting Parties may, however, retain, build or acquire a maximum number of three submarines of a standard displacement not exceeding 2,800 tons (2,845 metric tons); these submarines may carry guns not above 6.1-inch (155 mm.) calibre. Within this number, France may retain one unit, already launched, of 2,880 tons (2,926 metric tons), with guns the calibre of which is 8 inches (203 mm.).

3. The High Contracting Parties may retain the submarines which they possessed on the 1st April, 1930, having a standard displacement not in excess of 2,000 tons (2,032 metric tons) and armed with guns above 5.1-inch (130 mm.) calibre.

4. As from the coming into force of the present Treaty in respect of all the High Contracting Parties, no submarine the standard displacement of which exceeds 2,000 tons (2,032 metric tons) or with a gun above 5.1-inch (130 mm.) calibre shall be constructed within the jurisdiction of any of the High Contracting Parties, except as provided in paragraph 2 of this Article.

Article 8.

Subject to any special agreements which may submit them to limitation, the following vessels are exempt from limitation:

(*a*) naval surface combatant vessels of 600 tons (610 metric tons) standard displacement and under;

(*b*) naval surface combatant vessels exceeding 600 tons (610 metric tons), but not exceeding 2,000 tons (2,032 metric tons) standard displacement, provided they have none of the following characteristics:

(1) mount a gun above 6.1-inch (155 mm.) calibre;
(2) mount more than four guns above 3-inch (76 mm.) calibre;
(3) are designed or fitted to launch torpedoes;
(4) are designed for a speed greater than twenty knots.

(*c*) naval surface vessels not specifically built as fighting ships which are employed on fleet duties or as troop transports or in some other way than as fighting ships, provided they have none of the following characteristics:

(1) mount a gun above 6.1-inch (155 mm.) calibre;
(2) mount more than four guns above 3-inch (76 mm.) calibre;
(3) are designed or fitted to launch torpedoes;
(4) are designed for a speed greater than twenty knots;
(5) are protected by armour plate;
(6) are designed or fitted to launch mines;
(7) are fitted to receive aircraft on board from the air;
(8) mount more than one aircraft-launching apparatus on the centre line; or two, one on each broadside;
(9) if fitted with any means of launching aircraft into the air, are designed or adapted to operate at sea more than three aircraft.

ARTICLE 9.

The rules as to replacement contained in Annex I to this Part II are applicable to vessels of war not exceeding 10,000 tons (10,160 metric tons) standard displacement, with the exception of aircraft carriers, whose replacement is governed by the provisions of the Washington Treaty.

ARTICLE 10.

Within one month after the date of laying down and the date of completion respectively of each vessel of war, other than capital ships, aircraft carriers and the vessels exempt from limitation under Article 8, laid down or completed by or for them after the coming into force of the present Treaty, the High Contracting Parties shall

communicate to each of the other High Contracting Parties the information detailed below:

(*a*) the date of laying the keel and the following particulars:
classification of the vessel;
standard displacement in tons and metric tons;
principal dimensions, namely: length at water-line, extreme beam at or below water-line;
mean draft at standard displacement;
calibre of the largest gun.

(*b*) the date of completion together with the foregoing particulars relating to the vessel at that date.

The information to be given in the case of capital ships and aircraft carriers is governed by the Washington Treaty.

ARTICLE 11.

Subject to the provisions of Article 2 of the present Treaty, the rules for disposal contained in Annex II to this Part II shall be applied to all vessels of war to be disposed of under the said Treaty, and to aircraft carriers as defined in Article 3.

ARTICLE 12.

1. Subject to any supplementary agreements which may modify, as between the High Contracting Parties concerned, the lists in Annex III to this Part II, the special vessels shown therein may be retained and their tonnage shall not be included in the tonnage subject to limitation.

2. Any other vessel constructed, adapted or acquired to serve the purposes for which these special vessels are retained shall be charged against the tonnage of the appropriate combatant category, according to the characteristics of the vessel, unless such vessel conforms to the characteristics of vessels exempt from limitation under Article 8.

3. Japan may, however, replace the minelayers "Aso" and "Tokiwa" by two new minelayers before the 31st December, 1936. The standard displacement of each of the new vessels shall not exceed 5,000 tons (5,080 metric tons); their speed shall not exceed twenty knots, and their characteristics shall conform to the provisions of paragraph (*b*) of Article 8. The new vessels shall be regarded as especial vessels and their tonnage shall not be chargeable to the tonnage of any combatant category. The "Aso" and "Tokiwa" shall be disposed of in accordance with Section I or II of Annex II to this Part II, on completion of the replacement vessels.

4. The "Asama", "Yakumo", "Izumo", "Iwate" and "Kasuga" shall be disposed of in accordance with Section I or II of Annex II to this part II when the first three vessels of the "Kuma" class have been replaced by new vessels. These three vessels of the "Kuma" class shall be reduced to the condition prescribed in Section V, subparagraph (*b*)2 of Annex II to this Part II, and are to be used for training ships, and their tonnage shall not thereafter be included in the tonnage subject to limitation.

ARTICLE 13.

Existing ships of various types, which, prior to the 1st April, 1930, have been used as stationary training establishments or hulks, may be retained in a nonseagoing condition.

ANNEX I.

Rules for replacement.

SECTION 1.—Except as provided in Section III of this Annex and Part III of the present Treaty, a vessel shall not be replaced before it becomes "over-age". A vessel shall be deemed to be "over-age" when the following number of years have elapsed since the date of its completion.

(*a*) For a surface vessel exceeding 3,000 tons (3.048 metric tons) but not exceeding 10,000 tons (10,160 metric tons) if standard displacement:

(i) if laid down before the 1st January 1920: 16 years;
(ii) if laid down after the 31st December 1919: 20 years.

(*b*) For a surface vessel not exceeding 3,000 tons (3,048 metric tons) standard displacement:

(i) if laid down before the 1st January, 1921: 12 years;
(ii) if laid down after the 31st December, 1920: 16 years.

(*c*) For a submarine: 13 years.

The keels of replacement tonnage shall not be laid down more than three years before the year in which the vessel to be replaced becomes "over-age"; but this period is reduced to two years in the case of any replacement surface vessel not exceeding 3,000 tons (3,048 metric tons) standard displacement.

The right of replacement is not lost by delay in laying down replacement tonnage.

SECTION II.—Except as otherwise provided in the present Treaty, the vessel or vessels, whose retention would cause the maximum tonnage permitted in the category to be exceeded, shall, on the completion or acquisition of replacement tonnage, be disposed of in accordance with Annex II to this Part II.

SECTION III.—In the event of loss or accidental destruction a vessel may be immediately replaced.

ANNEX II.

Rules for disposal of Vessels of War.

The present Treaty provides for the disposal of vessels of war in the following ways:

(i) by scraping (sinking or breaking up);
(ii) by converting the vessel to a hulk;
(iii) by converting the vessel to target use exclusively;
(iv) by retaining the vessel exclusively for experimental purposes;
(v) by retaining the vessel exclusively for training purposes.

Any vessel of war to be disposed of, other than a capital ship, may either be scrapped or converted to a hulk at the option of the High Contracting Party concerned.

Vessels, other than capital ships, which have been retained for target, experimental or training purposes, shall finally be scrapped or converted to hulks.

SECTION I.—*Vessels to be scrapped.*

(*a*) A vessel to be disposed of by scrapping, by reason of its replacement, must be rendered incapable of warlike service within six months of the date of the completion of its successor, or of

the first of its successors if there are more than one. If, however, the completion of the new vessel or vessels be delayed, the work of rendering the old vessel incapable of warlike service shall, nevertheless, be completed within four and a half years from the date of laying the keel of the new vessel, or of the first of the new vessels; but should the new vessel, or any of the new vessels, be a surface vessel not exceeding 3,000 tons (3,048 metric tons) standard displacement, this period is reduced to three and a half years.

(*b*) A vessel to be scrapped shall be considered incapable of warlike service when there shall have been removed and landed or else destroyed in the ship:

(1) all the guns and essential parts of guns, fire control tops and revolving parts of all barbettes and turrets;
(2) all hydraulic or electric machinery for operating turrets;
(3) all fire control instruments and rangefinders;
(4) all ammunition, explosives, mines and mine rails;
(5) all torpedoes, war heads, torpedo tubes and training racks;
(6) all wireless telegraphy installations;
(7) all main propelling machinery, or alternatively the armoured conning tower and all side armour plate;
(8) all aircraft cranes, derricks, lifts and launching apparatus. All landing-on or flying-off platforms and decks, or alternatively all main propelling machinery;
(9) In addition, in the case of submarines, all main storage batteries, air compressor plants and ballast pumps.

(*c*) Scrapping shall be finally effected in either of the following ways within twelve months of the date on which the work of rendering the vessel incapable of warlike service is due for completion:

(1) permanent sinking of the vessel;
(2) breaking the vessel up; this shall always include the destruction or removal of all machinery, boilers and armour, and all deck, side and bottom plating.

SECTION II.—*Vessels to be converted to hulks.*

A vessel to be disposed of by conversion to a hulk shall be considered finally disposed of when the conditions prescribed in Section I, paragraph (b), have been complied with, omitting subparagraphs (6), (7) and (8), and when the following have been effected:

(1) mutilation beyond repair of all propeller shafts, thrust blocks, turbine gearing or main propelling motors, and turbines or cylinders of main engines;
(2) removal of propeller brackets;
(3) removal and breaking up of all aircraft lifts, and the removal of all aircraft cranes, derricks and launching apparatus.

The vessel must be put in the above condition within the same limits of time as provided in Section I for rendering a vessel incapable of warlike service.

SECTION III.—*Vessels to be converted to target use.*

(*a*) A vessel to be disposed of by conversion to target use exclusively shall be considered incapable of warlike service when there have been removed and landed, or rendered unserviceable on board, the following:

(1) all guns;
(2) all fire control tops and instruments and main fire control communication wiring;
(3) all machinery for operating gun mountings or turrets;
(4) all ammunition, explosives, mines, torpedoes and torpedo tubes;
(5) all aviation facilities and accessories.

The vessel must be put into the above condition within the same limits of time as provided in Section I for rendering a vessel incapable of warlike service.

(*b*) In addition to the rights already possessed by each High Contracting Party under the Washington Treaty, each High Contracting Party is permitted to retain, for target use exclusively, at any one time:

(1) not more than three vessels (cruisers or destroyers) but of these three vessels only one may exceed 3,000 tons (3,048 metric tons) standard displacement;
(2) one submarine.

(*c*) On retaining a vessel for target use, the High Contracting Party concerned undertakes not to recondition it for warlike service.

SECTION IV.—*Vessels retained for experimental purposes.*

(*a*) A vessel to be disposed of by conversion to experimental purposes exclusively shall be dealt with in accordance with the provisions of Section III(*a*) of this Annex.

(*b*) Without prejudice to the general rules, and provided that due notice be given to the other High Contracting Parties, reasonable variation from the conditions prescribed in Section III(*a*) of this Annex, in so far as may be necessary for the purposes of a special experiment, may be permitted as a temporary measure.

Any High Contracting Party taking advantage of this provision is required to furnish full details of any such variations and the period for which they will be required.

(*c*) Each High Contracting Party is permitted to retain for experimental purposes exclusively at any one time:

(1) not more than two vessels (cruisers or destroyers), but of these two vessels only one may exceed 3,000 tons (3,048 metric tons) standard displacement;
(2) one submarine.

(*d*) The United Kingdom is allowed to retain, in their present conditions, the monitor "Roberts", the main armament guns and mountings of which have been mutilated, and the seaplane carrier "Ark Royal", until no longer required for experimental purposes. The retention of these two vessels is without prejudice to the retention of vessels permitted under (*c*) above.

(*e*) On retaining a vessel for experimental purposes the High Contracting Party concerned undertakes not to recondition it for warlike service.

SECTION V.—*Vessels retained for training purposes.*

(*a*) In addition to the rights already possessed by any High Contracting Party under the Washington Treaty, each High Contracting Party is permitted to retain for training purposes exclusively the following vessels:

United States: 1 capital ship ("Arkansas" or "Wyoming");
France: 2 surface vessels, one of which may exceed 3,000 tons (3,048 metric tons) standard displacement;
United Kingdom: 1 capital ship ("Iron Duke");
Italy: 2 surface vessels, one of which may exceed 3,000 tons (3,048 metric tons) standard displacement;
Japan: 1 capital ship ("Hiyei"), 3 cruisers ("Kuma" class).

(*b*) Vessels retained for training purposes under the provisions of paragraph (a) shall, within six months of the date on which they are required to be disposed of, be dealt with as follows:

1. *Capital Ships.*

The following is to be carried out:

(1) removal of main armament guns, revolving parts of all barbettes and turrets; machinery for operating turrets; but three turrets with their armament may be retained in each ship;
(2) removal of all ammunition and explosives in excess of the quantity required for target practice training for the guns remaining on board;
(3) removal of conning tower and the side armour belt between the foremost and aftermost barbettes;
(4) removal or mutilation of all torpedo tubes;
(5) removal or mutilation on board of all boilers in excess of the number required for a maximum speed of eighteen knots.

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2. *Other surface vessels retained by France, Italy and Japan.*

The following is to be carried out:

(1) removal of one half of the guns, but four guns of main calibre may be retained on each vessel;
(2) removal of all torpedo tubes;
(3) removal of all aviation facilities and accessories;
(4) removal of one half of the boilers.

(*c*) The High Contracting Party concerned undertakes that vessels retained in accordance with the provisions of this Section shall not be used for any combatant purpose.

ANNEX III.

Special vessels.

United States.

Name and type of vessel.	Displacement. Tons.
Aroostook—Minelayer	4,950
Oglala—Minelayer	4,950
Baltimore—Minelayer	4,413
San Francisco—Minelayer	4,083
Cheyenne—Monitor	2,800
Helena—Gunboat	1,392
Isabel—Yacht	938
Niagara—Yacht	2,600
Bridgeport—Destroyer tender	11,750
Dobbin—Destroyer tender	12,450
Melville—Destroyer tender	7,150
Whitney—Destroyer tender	12,450
Holland—Submarine tender	11,570
Henderson—Naval transport	10,000
	91,496

France.

Name and type of vessel.	Displacement. Tons.
Castor—Minelayer	3,150
Pollux—Minelayer	2,461
Commandant-Teste—Seaplane carrier	10,000
Aisne—Despatch vessel	600
Marne " "	600
Ancre " "	604
Scarpe " "	604
Suippe " "	604
Dunkerque " "	644
Laffaux " "	644
Bapaume " "	644
Nancy—Despatch vessel	644
Calais " "	644
Lassigny " "	644
Les Eparges " "	644
Remiremont " "	644
Tahure " "	644
Toul " "	644
Épinal " "	644
Liévin " "	644
(—)—Netlayer	2,293
	28,644

British Commonwealth of Nations

Name and type of vessel.	Displacement. Tons.
Adventure—Minelayer (United Kingdom)	6,740
Albatross—Seaplane carrier (Australia)	5,000
Erebus—Monitor (United Kingdom)	7,200
Terror—Monitor (United Kingdom)	7,200
Marshal Soult—Monitor (United Kingdom)	6,400
Clive—Sloop (India)	2,021
Medway—Submarine depot ship (United Kingdom)	15,000
	49,561

ITALY.

Name and type of vessel.	Displacement. Tons.
Miraglia—Seaplane carrier	4,880
Faà di Bruno—Monitor	2,800
Monte Grappa—Monitor	605
Montello—Monitor	605
Monte Cengio—Ex-monitor	500
Monte Novegno—Ex-monitor	500
Campania—Sloop	2,070
	11,960

JAPAN.

Name and type of vessel.	Displacement. Tons.
Aso—Minelayer	7,180
Tokiwa " "	9,240
Asama—Old cruiser	9,240
Yakumo " "	9,010
Izumo " "	9,180
Iwate—Old cruiser	9,180
Kasuga " "	7,080
Yodo—Gunboat	1,320
	61,430

PART III.

The President of the United States of America, His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, and His Majesty the Emperor of Japan have agreed as between themselves to the provisions of this Part III:

ARTICLE 14.

The naval combatant vessels of the United States, the British Commonwealth of Nations and Japan, other than capital ships, aircraft carriers and all vessels exempt from limitation under Article 8, shall be limited during the term of the present Treaty as provided in this Part III, and, in the case of special vessels, as provided in Article 12.

ARTICLE 15.

For the purpose of this Part III the definition of the cruiser and destroyer categories shall be as follows:

Cruisers.

Surface vessels of war, other than capital ships or aircraft carriers, the standard displacement of which exceeds 1,850 tons (1,880 metric tons), or with a gun above 5.1-inch (130 mm.) calibre.

The cruiser category is divided into two sub-categories, as follows:

(*a*) cruisers carrying a gun above 6.1-inch (155 mm.) calibre;

(*b*) cruisers carryng a gun not above 6.1-inch (155 mm.) calibre.

Destroyers.

Surface vessels of war the standard displacement of which does not exceed 1,850 tons (1,880 metric tons), and with a gun not above 5.1-inch (130 mm.) calibre.

ARTICLE 16.

1. The completed tonnage in the cruiser, destroyer and submarine categories which is not to be exceeded on the 31st December, 1936, is given in the following table:

Categories	United States.	British Commonwealth of Nations.	Japan.
Cruisers:			
(*a*) with guns of more than 6.1-inch (155 mm.) calibre.	180,000 tons (182,880 metric tons)	146,800 tons (149,149 metric tons)	108,400 tons (110,134 metric tons)
(*b*) with guns of 6.1-inch (155 mm. calibre or less.	143,500 tons (145,796 metric tons)	192,200 tons (195,275 metric tons)	100,450 tons (102,057 metric tons)
Destroyers	150,000 tons (152,400 metric tons)	150,000 tons (152,400 metric tons)	105,500 tons (107,188 metric tons)
Submarines	52,700 tons (53,543 metric tons)	52,700 tons (53,543 metric tons)	52,700 tons (53,543 metric tons)

2. Vessels which cause the total tonnage in any category to exceed the figures given in the foregoing table shall be disposed of gradually during the period ending on the 31st December, 1936.

3. The maximum number of cruisers of sub-category (*a*) shall be as follows: for the United States, eighteen; for the British Commonwealth of Nations, fifteen; for Japan, twelve.

4. In the destroyer category not more than sixteen per cent. of the allowed total tonnage shall be employed in vessels of over 1,500 tons (1,524 metric tons) standard

displacement. Destroyers completed or under construction on the 1st April, 1930, in excess of this percentage may be retained, but no other destroyers exceeding 1,500 tons (1,524 metric tons) standard displacement shall be constructed or acquired until a reduction to such sixteen per cent. has been effected.

5. Not more than twenty-five per cent. of the allowed total tonnage in the cruiser category may be fitted with a landing-on platform or deck for aircraft.

6. It is understood that the submarines referred to in paragraphs 2 and 3 of Article 7 will be counted as part of the total submarine tonnage of the High Contracting Party concerned.

7. The tonnage of any vessels retained under Article 13 or disposed of in accordance with Annex II to Part II of the present Treaty shall not be included in the tonnage subject to limitation.

ARTICLE 17.

A transfer not exceeding ten per cent. of the allowed total tonnage of the category or sub-category into which the transfer is to be made shall be permitted between cruisers of sub-category (*b*) and destroyers.

ARTICLE 18.

The United States contemplates the completion by 1935 of fifteen cruisers of sub-category (*a*) of an aggregate tonnage of 150,000 tons (152,400 metric tons). For each of the three remaining cruisers of sub-category (*a*) which it is entitled to construct the United States may elect to substitute 15,166 tons (15,409 metric tons) of cruisers of sub-category (*b*). In case the United States shall construct one or more of such three remaining cruisers of sub-category (*a*), the sixteenth unit will not be laid down before 1933 and will not be completed before 1936; the seventeenth will not be laid down before 1934 and will not be completed before 1937; the eighteenth will

not be laid down before 1935 and will not be completed before 1938.

ARTICLE 19.

Except as provided in Article 20, the tonnage laid down in any category subject to limitation in accordance with Article 16 shall not exceed the amount necessary to reach the maximum allowed tonnage of the category, or to replace vessels that become "over-age" before the 31st December, 1936. Nevertheless, replacement tonnage may be laid down for cruisers and submarines that become "over-age" in 1937, 1938, and 1939, and for destroyers that become "over-age" in 1937 and 1938.

ARTICLE 20.

Notwithstanding the rules for replacement contained in Annex I to Part II:

(*a*) The "Frobisher" and "Effingham" (United Kingdom) may be disposed of during the year 1936. Apart from the cruisers under construction on the 1st April, 1930, the total replacement tonnage of cruisers to be completed, in the case of the British Commonwealth of Nations, prior to the 31st December, 1936, shall not exceed 91,000 tons (92,456 metric tons).

(*b*) Japan may replace the "Tama" by new construction to be completed during the year 1936.

(*c*) In addition to replacing destroyers becoming "over-age" before the 31st December, 1936, Japan may lay down, in each of the years 1935 and 1936, not more than 5,200 tons (5,283 metric tons) to replace part of the vessels that become "over-age" in 1938 and 1939.

(*d*) Japan may anticipate replacement during the term of the present Treaty by laying down not more than 19,200 tons (19,507 metric tons) of submarine tonnage, of which not more than 12,000 tons (12,192 metric tons) shall be completed by the 31st December, 1936.

Article 21.

If, during the term of the present Treaty, the requirements of the national security of any High Contracting Party in respect of vessels of war limited by Part III of the present Treaty are in the opinion of that Party materially affected by new construction of any Power other than those who have joined in Part III of this Treaty, that High Contracting Party will notify the other Parties to Part III as to the increase required to be made in its own tonnages within one or more of the categories of such vessels of war, specifying particularly the proposed increases and the reasons therefor, and shall be entitled to make such increase. Thereupon the other Parties to Part III of this Treaty shall be entitled to make a proportionate increase in the category or categories specified; and the said other Parties shall promptly advise with each other through diplomatic channels as to the situation thus presented.

PART IV.

Article 22.

The following are accepted as established rules of International Law:

(1) In their action with regard to merchant ships, submarines must conform to the rules of International Law to which surface vessels are subject.

(2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety. For this purpose the ship's boats are not regarded as a place of safety unless the safety of the passengers and crew is assured, in the existing sea and weather conditions, by the proximity of land, or the presence of another vessel which is in a position to take them on board.

The High Contracting Parties invite all other Powers to express their assent to the above rules.

PART V.

Article 23.

The present Treaty shall remain in force until the 31st December, 1936, subject to the following exceptions:

(1) Part IV shall remain in force without limit of time;

(2) the provisions of Articles 3, 4 and 5, and of Article 11 and Annex II of Part II so far as they relate to aircraft carriers, shall remain in force for the same period as the Washington Treaty.

Unless the High Contracting Parties should agree otherwise by reason of a more general agreement limiting naval armaments, to which they all become parties, they shall meet in conference in 1935 to frame a new treaty to replace and to carry out the purposes of the present Treaty, it being understood that none of the provisions of the present Treaty shall prejudice the attitude of any of the High Contracting Parties at the conference agreed to.

Article 24.

1. The present Treaty shall be ratified by the High Contracting Parties in accordance with their respective constitutional methods and the ratifications shall be deposited at London as soon as possible. Certified copies of all the *procès-verbaux* of the deposit of ratifications will be transmitted to the Governments of all the High Contracting Parties.

2. As soon as the ratifications of the United States of America, of His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, in respect of each and all of the Members of the British Commonwealth of Nations as enumerated in the preamble of the present Treaty, and of His

Majesty the Emperor of Japan have been deposited, the Treaty shall come into force in respect of the said High Contracting Parties.

3. On the date of the coming into force referred to in the preceding paragraph, Parts I, II, IV and V of the present Treaty will come into force in respect of the French Republic and the Kingdom of Italy if their ratifications have been deposited at that date; otherwise these Parts will come into force in respect of each of those Powers on the deposit of its ratification.

4. The rights and obligations resulting from Part III of the present Treaty are limited to the High Contracting Parties mentioned in paragraph 2 of this Article. The High Contracting Parties will agree as to the date on which, and the conditions under which, the obligations assumed under the said Part III by the High Contracting Parties mentioned in paragraph 2 of this Article will bind them in relation to France and Italy; such agreement will determine at the same time the corresponding obligations of France and Italy in relation to the other High Contracting Parties.

Article 25.

After the deposit of the ratifications of all the High Contracting Parties, His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland will communicate the provisions inserted in Part IV of the present Treaty to all Powers which are not signatories of the said Treaty, inviting them to accede thereto definitely and without limit of time.

Such accession shall be effected by a declaration addressed to His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland.

Article 26.

The present Treaty, of which the French and English texts are both authentic, shall remain deposited in the

archives of His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland. Duly certified copies thereof shall be transmitted to the Governments of all the High Contracting Parties.

In faith whereof the above-named Plenipotentiaries have signed the present Treaty and have affixed thereto their seals.

Done at London, the twenty-second day of April, nineteen hundred and thirty.

[SEAL] HENRY L. STIMSON.
[SEAL] CHARLES G. DAWES.
[SEAL] CHARLES F. ADAMS.
[SEAL] JOSEPH T. ROBINSON.
[SEAL] DAVID A. REED.
[SEAL] HUGH GIBSON.
[SEAL] DWIGHT W. MORROW.
[SEAL] ARISTIDE BRIAND.
[SEAL] J. L. DUMESNIL.
[SEAL] A. DE FLEURIAU.
[SEAL] J. RAMSAY MACDONALD.
[SEAL] ARTHUR HENDERSON.
[SEAL] A. V. ALEXANDER.
[SEAL] W. WEDGWOOD BENN.
[SEAL] PHILIPPE ROY.
[SEAL] JAMES E. FENTON.
[SEAL] T. M. WILFORD.
[SEAL] C. T. TE WATER.
[SEAL] T. A. SMIDDY.
[SEAL] ATUL C. CHATTERJEE.
[SEAL] G. SIRIANNI.
[SEAL] A. C. BORDONARO.
[SEAL] ALFREDO ACTON.
[SEAL] R. WAKATSUKI.
[SEAL] TAKESHI TAKARABE.
[SEAL] T. MATSUDAIRA.
[SEAL] M. NAGAI.

II

1. *The British Secretary of State for Foreign Affairs (Henderson) to the American Ambassador in Great Britain (Dawes), October 7, 1929*

I have the honour to transmit to your excellency herewith copies of the notes which I am to-day addressing to the French, Italian, and Japanese Ambassadors in London inviting the French, Italian, and Japanese Governments to participate in a five-power conference to deal with the question of naval disarmament, which it is proposed to hold in London in the latter part of January next.

2. As I understand that the Government of the United States concur in the terms of the enclosed notes, I shall be grateful if your excellency will be so good as to confirm my impression that they will find it possible to participate in the conference above mentioned.

[Enclosure]

The British Secretary of State for Foreign Affairs (Henderson) to the French, Italian, and Japanese Ambassadors in Great Britain, October 7, 1929

I have the honour to inform your excellency that the informal conversations on the subject of naval disarmament which have been proceeding in London during the last three months between the Prime Minister and the Ambassador of the United States have now reached a stage at which it is possible to say that there is no point outstanding of such serious importance as to prevent an agreement.

From time to time the Prime Minister has notified your excellency of the progress made in these discussions and I now have the honour to state that provisional and informal agreement has been reached on the following principles:

1. The conversations have been one of the results of the Treaty for the Renunciation of War signed at Paris in 1928 which brought about a realignment of our national attitudes on the subject of security in consequence of the provision that war should not be used as an instrument of national policy in the relations of nations one to another. Therefore the Peace Pact has been regarded as the starting point of agreement.

2. It has been agreed to adopt the principle of parity in each of the several categories and that such parity shall be reached by December 31st, 1936. Consultation between His Majesty's Government in the United Kingdom and His Majesty's Government in the Dominions has taken place and it is contemplated that the programme of parity on the British side should be related to naval forces of all parts of the Empire.

3. The question of battleship strength was also touched upon during the conversations and it has been agreed in these conversations that subject to the assent of other signatory powers it would be desirable to reconsider the battleship replacement programmes provided for in the Washington treaty of 1922 with the view of diminishing the amount of replacement construction implied under that treaty.

4. Since both the Government of the United States and His Majesty's Government in the United Kingdom adhere to the attitude that they have publicly adopted in regard to the desirability of securing the total abolition of the submarine, this matter hardly gave rise to discussion during the recent conversations. They recognize, however, that no final settlement on this subject can be reached except in conference with the other naval Powers.

In view of the scope of these discussions both Governments consider it most desirable that a conference should be summoned to consider the categories not covered by the Washington treaty and to arrange for and deal with the questions covered by the second paragraph of Article 21 of that treaty. It is our earnest hope that the ------ ---------- Government will agree to the desirability of such a conference. His Majesty's Government in the United Kingdom and the Government of the United States are in accord that such a conference should be

held in London at the beginning of the third week of January, 1930, and it is hoped that the _____ Government will be willing to appoint representatives to attend it.

A similar invitation is being addressed to the Governments of _____ and the United States; and His Majesty's Governments in the Dominions are being asked to appoint representatives to take part in the conference. I should be grateful if your excellency would cause the above invitation to be addressed to the _____ Government.

In the same way as the two Governments have kept your excellency informally *au courant* of the recent discussions, so now His Majesty's Government will be willing, in the interval before the proposed conference, to continue informal conversations with your excellency on any points which may require elucidation. The importance of reviewing the whole naval situation at an early date is so vital in the interests of general disarmament that I trust that your excellency's Government will see their way to accept this invitation and that the date proposed will be agreeable to them.

His Majesty's Government in the United Kingdom propose to communicate to you in due course their views as to the subjects which they think should be discussed at the conference, and will be glad to receive a corresponding communication from the _____ Government.

It is hoped that at this conference the principal naval powers may be successful in reaching agreement. I should like to emphasize that His Majesty's Government have discovered no inclination in any quarter to set up new machinery for dealing with the naval disarmament question; on the contrary, it is hoped that by this means a text can be elaborated which will facilitate the task of the League of Nations Preparatory Commission and of the subsequent General Disarmament Conference.

2. *The American Chargé d'Affaires in Great Britain (Atherton) to the British Secretary of State for Foreign Affaires (Henderson), October 10, 1929*

I have the honor to refer to the note which you were good enough to address to the Ambassador on October 7th, and I take great pleasure in informing you that the American Government hastens to accept the invitation of His Majesty's Government to a conference on naval armaments to take place in London the latter part of January, which will unite the powers signatory to the Washington treaty in a discussion which will anticipate the problems raised under Article 21 of that treaty as well as broaden its whole scope by the inclusion of the other categories of ships.

3. *Statement of the President of the United States and the British Prime Minister, October 10, 1929*

During the last few days we have had an opportunity, in the informal talks in which we have engaged, not only to review the conversations on a naval agreement which have been carried on during this summer between us, but also to discuss some of the more important means by which the moral force of our countries can be exerted for peace.

We have been guided by the double hope of settling our own differences on naval matters and so establishing unclouded good will, candor, and confidence between us, and also of contributing something to the solution of the problem of peace in which all other nations are interested and which calls for their cooperation.

In signing the Paris Peace Pact 56 nations have declared that war shall not be used as an instrument of national policy. We have agreed that all disputes shall be settled by pacific means. Both our Governments resolve to accept the Peace Pact not only as a declaration of good intentions but as a positive obligation to direct national policy in accordance with its pledge.

The part of each of our Governments in the promotion of world peace will be different, as one will never consent to become entangled in European diplomacy and the other is resolved to pursue a policy of active cooperation with its European neighbors; but each of our Governments will direct its thoughts and influence towards securing and maintaining the peace of the world.

Our conversations have been largely confined to the mutual relations of the two countries in the light of the situation created by the signing of the Peace Pact. Therefore, in a new and reinforced sense the two Governments not only declare that war between them is unthinkable, but that distrusts and suspicions arising from doubts and fears which may have been justified before the Peace Pact must now cease to influence national policy. We approach old historical problems from a new angle and in a new atmosphere. On the assumption that war between us is banished, and that conflicts between our military or naval forces cannot take place, these problems have changed their meaning and character, and their solution, in ways satisfactory to both countries, has become possible.

We have agreed that those questions should become the subject of active consideration between us. They involve important technical matters requiring detailed study. One of the hopeful results of the visit which is now terminating officially has been that our two Governments will begin conversations upon them following the same method as that which has been pursued during the summer in London.

The exchange of views on naval reduction has brought the two nations so close to agreement that the obstacles in previous conferences arising out of Anglo-American disagreements seem now substantially removed. We have kept the nations which took part in the Washington Naval Conference of 1922 informed of the progress of our conversations, and we have now proposed to them that we should all meet together and try to come to a

common agreement which would justify each in making substantial naval reductions. An agreement on naval armaments can not be completed without the cooperation of other naval powers, and both of us feel sure that, by the same free and candid discussion of needs which has characterized our conversations, such mutual understandings will be reached as will make naval agreement next January possible, and thus remove this serious obstacle to the progress of world disarmament.

Between now and the meeting of the proposed conference in January, our Governments will continue conversations with the other powers concerned, in order to remove as many difficulties as possible before the official and formal negotiations open.

In view of the security afforded by the Peace Pact, we have been able to end, we trust forever, all competitive building between ourselves with the risk of war and the waste of public money involved, by agreeing to a parity of fleets, category by category.

Success at the coming conference will result in a large decrease in the naval equipment of the world and, what is equally important, the reduction of prospective programs of construction which would otherwise produce competitive building to an indefinite amount.

We hope and believe that the steps we have taken will be warmly welcomed by the people whom we represent as a substantial contribution to the efforts universally made by all nations to gain security for peace not by military organization but by peaceful means rooted in public opinion and enforced by a sense of justice in the civilized world.

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